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AND
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CONVEYANCER'S NOTEBOOK.

In the emergency created by the War we regret the delay caused in the issue of this number. It has been due to a change of policy which was thought best to meet the needs of the profession. Although the current number was already prepared and largely in print it was decided to provide as far as possible summaries of the emergency legislation affecting conveyancers. These articles are intended to provide information on the main points and to indicate special matters requiring attention. It is not of course possible to deal with all details, for which the practitioner will have to seek guidance from the annotated texts of the Acts.

It is hoped to be able to continue publication hereafter at the usual quarterly intervals and to pursue the policy of dealing with emergency legislation. Subject to this, the general policy of the journal will remain unchanged. It is inevitable that the Precedents section of *The Conveyancer* will be devoted in the early stages especially to forms required by the emergency legislation, but subject to this it is hoped to continue to supplement the general forms of the Encyclopædia by forms of special interest.

Powers of attorney—trustees serving abroad.—We print below a letter from Messrs. Gregory, Rowcliffe & Co., and on another page the form settled by the Senior Master. The profession should be very grateful for the courtesy and public spirit shown by Messrs. Gregory, Rowcliffe in making available at this date the form so settled.

" Sir,—In order to avoid the necessity of donors of powers of attorney having to attend before a commissioner for oaths immediately before leaving England, and to enable a donor to complete the power and make the necessary statutory declaration a few days previously, the Senior Master some time ago settled the accompanying form of declaration [set out in Precedents Section, p. 472]. The adoption of this form may be found a convenience to many practitioners, and you may therefore like to insert it in *The Conveyancer.*

London, W.C.1. GREGORY, ROWCLIFFE & Co."

Land Registry—hours of business.—As from November 1, 1939, the hours of business for all purposes will be from 11 a.m. to 2 p.m., Saturdays 11 a.m. to 12 noon. All business, however, can be conducted by post, and the Registry request that practitioners should make use of this facility.

Report of Chief Land Registrar.—The Report of the Chief Land Registrar contains one unusual feature and that is an estimate of a deficit. The work of the Registry progresses and has indeed achieved remarkable standards of success, but the fall in land values, as it seems, is responsible for a diminution in fee income so substantial as to cause the anticipation of loss on the year's working. There is a contributory cause, and that is the high cost of dealing with first registrations in the non-compulsory area. As the Registrar diagnoses, and practitioners well know from experience, most of the titles put on the Register are registered either for the purposes of development as a building estate, always expensive to the Registry, or because the title provides so many difficulties that the simplification arising from registration is well worth the extra expense. As a result the Report contemplates, what is now an established fact, a new Fee Order in which the fees are higher for the non-compulsory than the compulsory areas. What effect, if any, this differentiation may have in non-compulsory areas remains to be seen.

Another striking fact that is worth recording is that first registrations in London (excluding Middlesex) totalled 5,286, and in the non-compulsory area 3,661, but the dealings in the non-compulsory area are substantially higher than in London. This is due in large measure to the fact that so many of the first registrations in the non-compulsory area are building estates in which the transactions are dealings with part of the title first registered. Hence in London transfers of part of the land were only 1,995

while in the non-compulsory area such transfers amounted to 15,291, considerably more than half such transactions for all areas. As in fact every transfer of part means the creation of a new title the number of new titles in the non-compulsory area, therefore, during the last year was very substantial.

The Report refers to the payment of £10,000 to the Ordnance Survey on account of maps for the proposed compulsory area of Surrey, but there is no mention of any final date decided for the application of the compulsory provisions. Nor is there any indication that these compulsory provisions are to be applied to any other area. On the other hand, the Report says that in the first three months all arrangements in the new compulsory area of Croydon have worked with the same ease, smoothness and speed as in London. It seems that there can be little doubt that the advantages of registration are particularly experienced in urban areas, where also the difficulties in registration are less noticeable. What effect, if any, this experience may have on the almost certain progress of the application of the compulsory provisions remains to be seen.

On the administrative side the Chief Land Registrar is especially to be congratulated on the steady decline in the cost of administration which has enabled him twice since 1925 to reduce the fees which are now materially below the pre-war level though obviously the cost of all services and supplies has risen. This can hardly be said to be offset by the new fee order (published elsewhere in this number) which raises the fees in the non-compulsory area. Undeveloped building estates and complex titles are undoubtedly a justification for differentiation since the expense of survey and investigation of difficult titles, which must represent the bulk of such registrations, are out of all proportion to the normal routine of conveyancing in any district. Therefore, despite the difficulties experienced in balancing the budget we would like to offer our respectful congratulations on the Report which has been issued.

Registered land—office copies of the Register and filed plan.—We print the following announcement from the Land Registry:—

"The Chief Land Registrar wishes to inform solicitors that office copies of the register can now be obtained from the Registry for 1s. 6d. and photographic office copies of the filed plan for 1s. each in all normal cases. Under section 113 of the Land Registration Act, 1925, such office copies are admissible in evidence to the same extent as the originals and any person suffering loss owing to any error in them is entitled to be indemnified by the Registry.

"Such office copies not only save vendors' solicitors the trouble and cost of having themselves to make copies of the entries in the land certificate for the use of purchasers (and sometimes having to make a personal search at the Registry beforehand to enable them to do so) but when supplied to the purchasers' solicitors save them the cost and trouble of having to make personal searches at the Registry for the purpose of comparing the copies supplied to them with the register and filed plan.

"Such office copies can also be obtained by purchasers' solicitors, when authorised to inspect the register, if not supplied to them by the vendor."

It is to be hoped that solicitors will avail themselves of these provisions as a matter of routine. They are peculiarly useful where the Land Certificate is deposited at the Land Registry, because inspection of a Charge Certificate is not satisfactory and furthermore they eliminate the difficulty of the Land Certificate not being up to date in connection with such matters, as cautions, which do not require deposit of the Land Certificate for entry on the Register. Their convenience when solicitors acting respectively for vendor and purchaser are not resident in the same town is also obvious. The cost is now so small that the employment of this method of proving title can be regarded as a major development in the simplification of investigation of title and it is to be hoped that use may generally be made of it. It is suggested that purchasers' solicitors might well requisition on the draft contract asking that such office copies be supplied. The use of certified office copies should eliminate in large measure the desirability of personal searches at the Registry (see Potter, *Registered Land Conveyancing*, p. 310), though this may be necessary in the unusual case where doubt exists concerning the exact effect of the entries. It is also possible to solve these problems as a rule by obtaining office copies or extracts from filed documents: see L. R. R. 264.

Union of benefices.—Though, perhaps, not usually regarded strictly within the province of conveyancing it may be a matter of general interest to call attention to the decision of the Privy Council upon the principles governing the union of benefices under the Union of Benefices (Amendment) Measure, 1936, in the case of *Re Westoe and South Shields, St. Hilda* (1939), 108 L. J. P. C. 35. Here the commission appointed by the Bishop of Durham recommended (but not unanimously) and the Ecclesiastical Commissioners

decided to unite two urban benefices in South Shields. The purpose of the union was to provide funds for the removal of one of the parish churches and the endowment of a living in a new housing district. Both the parishes to be united had a considerable population amounting to something like 5,000 people respectively, and one parish had high church traditions and the other low church traditions. The Privy Council dismissed the scheme.

The essential principle behind the advice to His Majesty seems to be in the last few words of Lord Romer (at p. 38): "Their Lordships realise to the full that every union of two benefices must result in some deprivations and some inconveniences to many, or it may be to all, of the residents in the two parishes. But these residents must be prepared to make some sacrifices in order to obtain the benefits accruing to them from the union. In the present case, unfortunately, though the sacrifices are many, of benefits there are none." This follows the principle laid down by Lord Tomlin in *Re Great Massingham and Little Massingham Benefices*, [1931] A. C. at p. 332, decided on the Benefices Measure, 1923, but the amending Measure of 1936 had this distinction that in the earlier Measure the Commissioners were directed to have regard to the circumstances and *interests* of the parishes and to the interests of religion generally, whereas in the 1936 Measure the Commissioners were directed to have regard to the interests of religion generally as well as the circumstances and *claims* of the parishes. With regard to the distinction between *interests* and *claims* the Board expressed the opinion that it was not apparent what, if any, effect was thereby introduced. With regard to the alteration in the position of the "interests of religion generally", the Board expressed the view that the intention might be to make such interests the first care of the commissioners, but it was also clear that it was not the only care. While the interests of parishioners in the parish church and its endowments cannot properly be described as proprietary, there is no doubt that by tradition they have come to take a proprietary character. If the Church wishes to make drastic changes in use of church property and endowments in the interests of religion generally, it seems quite clear that something much more definite must be introduced than slight verbal alterations.

Attention is called to the Building Societies Act, 1939, which it is hoped to deal with in a later number. The Act comes into force on November 1, 1939.

THE CIVIL DEFENCE ACT, 1939.

By Lionel A. Blundell, LL.M., Barrister-at-Law.

The Civil Defence Act, 1939, has the object of making further provision for civil defence against attack from the air in wartime. It supplements the Air-Raid Precautions Act, 1937 (referred to as "the Act of 1937"), and the two statutes may be cited together as the Civil Defence Acts, 1937 and 1939. The new Act contains a wide variety of provisions connected directly or indirectly with the main purpose of the Act. It is proposed in this article to deal only with those provisions of the Act which more directly concern the property lawyer, by attaching new rights and liabilities to the ownership of estates in land; for the other provisions of the Act reference should be made to the statute itself or to one of the published books on the Act.

Provision of Public Shelters and "Designation" of Premises.

Part II of the Act confers upon local authorities certain powers in relation to the provision of public air-raid shelters. "Local authority" means, by section 11, in districts outside London, the council of a county or county borough, or of a borough or urban district in relation to which a direction has been given under section 1 (2), proviso (b) of the Act of 1937 that such council should prepare an air-raid general precautions scheme. But a county council scheme may provide for the exercise of county council functions under the Act by the council of a county district, and in relation to the designation of premises for an air-raid *fire precautions* scheme, the expression "the local authority" means the fire authority, that is to say, by section 90, in districts outside London, the council of a county borough or county district. Within the county of London, "local authority" or "fire authority" means, by section 84, such one or more of certain authorities as may be specified by order of the Minister: the authorities mentioned are the London County Council, the common council of the City, metropolitan borough councils, the district surveyor, and the respective overseers of the Inner Temple and the Middle Temple. Here, as elsewhere in the Act, "the Minister" means the Lord Privy Seal, by virtue of section 1 of the Act and the Civil Defence (Transfer of Functions) Order, 1939.

The local authority has powers under the Act to appropriate existing buildings for purposes of civil defence, to enter on land to construct underground shelters, and to construct air-raid shelter works on any highway *or land adjoining the highway*. The method by which existing buildings may be appropriated by the local authority is by the process of " designation ". By section 2 (1)—

" Where it appears to the local authority that the whole or any part of a building is or can be made suitable—

(a) for use as a public air-raid shelter; or

(b) for use, in the event of hostile attack, by the local authority in carrying out any of their civil defence functions,

the local authority may post in the building or part a notice declaring that that building or part may be required for use for public purposes of civil defence."

Such building or part then becomes " designated premises " and it is the duty of the local authority not only to notify the Minister thereof but to " take such steps as appear reasonably practicable to bring the contents of the notice to the knowledge of the persons having estates or interests in the building or part of a building ". The notice is to be registered as a local land charge and section 15 of the Land Charges Act, 1925, will apply. It will be remembered that section 15 of the Land Charges Act, 1925, applies (by sub-section 8) to local land charges affecting registered as well as unregistered land. The expression " such steps as appear reasonably practicable " is lacking in precision and may occasion difficulty. Clearly the register of land charges should be searched and inquiry made of the occupier as to all persons having any estate or interest in the building. Under section 2 (6) of the Act of 1939 a leaseholder occupying designated premises must serve notice of the designation on his immediate landlord or landlords, and every person upon whom notice is so served must in turn serve a copy of the notice upon his immediate landlord or landlords, if any, but this does not discharge the local authority from their own duty under sub-section 2, and it is particularly to be noticed that by section 90 " lease " does not include a mortgage, so that no duty is cast upon a mortgagor in possession to serve notice upon his mortgagee. In the case of registered land the effect of section 129 of the Land Registration Act, 1925, should be considered. It is perhaps to be regretted that the new Act does not contain a clear section like section 277 of the Public Health Act, 1936, enabling local authorities to require occupiers and others to furnish full information as to the ownership of premises.

The premises of public utility undertakers (see definition in section 90) are protected from designation by section 2 (5).

Sub-section 3 enables the local authority at any time to cancel the designation by posting a notice to that effect in the building or part of a building and causing the registration of the notice as a local land charge to be cancelled. A search at the registry of land charges will therefore always reveal whether premises are for the time being designated or not, but affords no protection against designation at a future date.

Appeal from designation is allowed under section 3 at the suit of any person having any estate or interest in the premises, within the very limited time of fourteen days from the designation, that is to say, from the posting of the notice. The appeal is to the Minister, and the only grounds permissible are—

(a) that the whole or any part of the premises is required for use for purposes of public importance and that accordingly it is inexpedient that they should be designated; or

(b) that the whole or any part of the premises is required for use as a private air-raid shelter for the persons in the premises or in the building of which they form part.

The Minister has power on the appeal to order that the designation shall cease to have effect (either wholly or as respects a specified part), in which case the same premises or part may not again be designated without the leave of the Minister.

Where it appears to the local authority expedient, for the purpose of making designated premises suitable or more suitable for any of the purposes mentioned in section 2 (1) that works should be executed therein or in the building of which they form part or in or on any adjacent building or land, they may by section 4 execute those works themselves if they are unable to secure their execution by agreement. Fourteen days' notice must be given to the occupier before entry without his consent to execute such works, and works may not be begun, except by agreement of all persons concerned, pending an appeal from designation or the expiration of the time for appealing. Notice of intention to execute works may be given at any time after the designation of the premises.

The power of the local authority to render designated premises suitable for purposes of civil defence is protected by stringent provisions in section 6 against interference with the premises or works executed therein. The prohibition extends to making, without the consent of the local authority, any structural alteration in any designated premises, and to removing or altering without such consent any works executed by, or by arrangement with, the local authority in or on designated premises or any building of which designated premises form part or any building or land

adjacent to designated premises. An appeal lies to quarter sessions against the local authority's refusal of consent to an alteration or removal.

Where works are executed under the above provisions *the occupier* can by section 6 claim compensation from the local authority for interference with his use of the premises during the execution of the works. Furthermore, where such works have impaired the usefulness of any premises, building or land, the local authority must pay compensation to the occupier from time to time by periodical sums, payable quarterly in arrear, calculated by reference to the diminution of the annual value which is ascribable to such impairment of usefulness. "Annual value" is the subject of a most elaborate definition in section 90. Generally speaking, it means the estimated rent at which the premises might reasonably be expected to let from year to year, the tenant paying usual tenant's rates and taxes and the landlord bearing repairs, insurance and any other expenses necessary to maintain the premises in a state to command that rent. In calculating the annual value any appreciation due to the fact that the premises are or can be made suitable for use in the event of hostile attack, and any depreciation due to the fact that the premises are likely to be required for use in that event, are both to be eliminated. The remainder of the definition of "annual value" is not relevant to this part of the Act.

Where premises cease to be designated it is the duty of the local authority to restore them, *as far as they think practicable*, to the condition in which they would be but for the execution of the works, and after completion of the restoration to compensate each person having any estate or interest therein in respect of any depreciation in value due to the works having been executed. The local authority may include in their notice withdrawing the designation of the premises a statement of the extent to which they "do not intend" to restore; then as respects matters specified in the statement, compensation will be determined by reference to the state of affairs when the designation was withdrawn. Of course, upon withdrawal of designation, payments for impairment of usefulness will cease, but the occupier is entitled to compensation for interference with his use of the premises during restoration by the local authority.

The requisition of designated premises in the event of an emergency is governed by section 57. If it appears to the Minister that in the view of the imminence of an emergency involving the possibility of hostile attack it is expedient so to do, he may by order declare the provisions of the section to be in operation. This will

entitle any local authority to take possession of any premises designated by them under Part II of the Act. Other provisions of the section enable the Commissioners of Works to take possession of premises for Government departments and local authorities to take possession (with certain safeguards) of vehicles for the discharge of civil defence functions. Where an order has been made under section 57, the local authority may remove, or require the occupier to remove, any property in the premises, and may take such other steps as may be necessary for putting the premises in a condition which will enable them to be used for the purpose intended. Refusal to move property or obstruction of the local authority is a punishable offence. Compensation to dispossessed persons is left to be determined hereafter by Parliament. The machinery of section 57 is seemingly intended only to operate in the first place as an emergency measure of temporary duration. By sub-section 4 possession is not to be retained by virtue of an order made under the section after the expiration of three months from the date of the making of the order, and this seems to contemplate further provisions to deal with the possibility of continued possession of the premises thereafter and the payment of compensation therefor.

It is to be observed that the powers dealt with so far may be exercised either for the provision of public air-raid shelters or for use by the local authority in carrying out their civil defence functions. Several other provisions of the Act confer additional powers for one or other of these objects. The local authority is given power by section 7 to enter on any land and construct an underground air-raid shelter or other underground premises required by the authority for use in the event of hostile attack in carrying out any of their civil defence functions, together with necessary entrances and works for ventilation, etc. Not less than twenty-eight days' notice in writing must be given to the occupier and, if and so far as it is reasonably practicable so to do, to the persons having the fee simple or a lease of the land. Such underground shelter or premises may under this section be constructed under a highway, or, subject to certain conditions as to objection made to the Minister, in any protected square, allotment, common, open space or land held by the National Trust (which expressions are defined in section 7 (7)). Any shelter or premises constructed by the local authority under this section vest on completion in the authority, and the local authority must pay to any person having an estate or interest in any land in which works are constructed under the section such compensation, if any, as may be just in respect of any damage caused to him by the construction of the

works or anything done by the authority for the maintenance thereof. The land and apparatus of public utility undertakers are protected by special provisions in sub-section 6.

By section 8 a local authority who have power to provide parking places may also provide underground parking places suitable for use as air-raid shelters, and the powers of section 7 may be exercised by such authority for that purpose. By sub-section 2, the authority providing parking places must have the approval of the local authority for the purposes of this part of the Act, if it is not the same authority and functions have not been delegated under the Act to the authority providing parking places. In addition to the notices to be given as under section 7, notice must be given under section 8 to the Minister of Transport and must be published in a local newspaper, and a notice of objection served on the local authority by any person affected thereby within twenty-eight days after publication of the notice must be referred to the Minister of Transport, who may if he thinks fit hold an inquiry.

A public air-raid shelter may be provided by the local authority under section 9 on any highway, and works may for that purpose be constructed not only in the highway but also on land adjoining the highway and appliances may be affixed to any building or wall adjoining the highway. But the local authority must, at least fourteen days before exercising these powers—

(a) serve on adjoining occupiers a notice of intention to exercise the powers specifying the general nature of the shelter;

(b) affix a similar notice in a prominent position upon or as near as possible to the site of the proposed shelter; *and*

(c) cause a similar notice to be published in a newspaper circulating in the area of the authority.

Apparatus of public utility undertakers is again protected by a special sub-section, and depreciation caused by the construction of the shelter to property adjoining the highway is, by sub-section 5, to be met by payment of " such compensation, if any, as may be just ".

The provisions of section 10 are mentioned below in dealing with private shelters for factories, etc.

Appropriation and Acquisition of Land for Civil Defence.

Further to the powers outlined above, a number of further provisions of a general nature must be noticed as to the appropriation and acquisition of land for civil defence purposes.

By section 62 of the Act of 1939 (which applies retrospectively

since the commencement of the Act of 1937) any local authority having civil defence functions may without formal appropriation use any lands or buildings owned by, leased to or under the control of the authority, for the purpose of discharging any of those functions, and the same applies to public utility undertakers served with a notice under Part V of the Act with respect to air-raid shelter or measures to secure the due functioning of the undertaking in the event of hostile attack. Furthermore any local authority within the Act of 1937 may permit any other local authority having civil defence functions to use its land or buildings for the discharge of those functions. "Use" includes the erection and alteration of buildings and other structures. These powers override any trust, covenant or restriction, but are in all cases subject to the approval and directions of the Minister.

By section 5 of the Air-Raid Precautions Act, 1937, as amended by section 1 of the Act of 1939, the council of any county, county borough, metropolitan borough or county district and the common council of the city of London may purchase land for any of the purposes of that Act by an order confirmed by the Minister, and sections 161, 162, 174, 175 and 179 (a) and (c) of the Local Government Act, 1933, apply, with references to the Minister and such council as aforesaid substituted for references to the Minister of Health and to a local authority. This section has been further amended by section 63 of the Act of 1939. Where an order is made and confirmed under section 5, then at any time after serving notice to treat and after giving to the occupier of the land not less than fourteen days' notice, they may enter on and take possession of the land or such part thereof as is specified in the notice without previous consent or compliance with sections 84 to 90 of the Land Clauses Consolidation Act, 1845, but subject to the payment of the like compensation for the land taken, and interest on compensation awarded, as would have been payable if those provisions had been complied with. Sub-section 2 of section 63 makes a further amendment which is, perhaps, of even greater importance. The Minister may, if he thinks fit, confirm without inquiry an order duly submitted under section 5, whether or not there has been an objection.

The same authorities as are mentioned in section 5 of the 1937 Act are by section 64 of the new Act given power to hire land compulsorily, but this only applies to unoccupied land and land in the occupation of a tenant whose tenancy will expire or can be determined (otherwise than for breach of conditions of the tenancy) within three years after the making of the compulsory hiring order. The procedure is by order confirmed by the Minister, and the

provisions as to compulsory acquisition of land apply with such modifications as may be prescribed by regulations of the Minister under section 64.

Private Shelters in Factories, Mines and Commercial Buildings.

Part III of the Act, which imposes obligations as to the provision of private shelters and certain other matters, is of limited application in two ways.

In the first place, it only applies in those areas specified by order of the Minister, although the Minister may also make an order declaring that specified premises shall be treated as if they were in such an area.

In the second place, it applies to factory premises, mines and commercial buildings. The definition of "factory premises" turns upon the definition of "factory", but it must be remembered that it is "factory premises" and not "a factory" that Part III of the Act deals with. "Factory" means a factory within section 151 of the Factories Act, 1937, but does not include premises occupied by the Crown, nor a factory *entirely situate* in a building not wholly occupied by the occupier of the factory; and where *part of a factory* is situate in a building not wholly occupied by the occupier of the factory, that part is deemed for the purposes of this Act not to form part of the factory (section 89 (1)). Where there exists a "factory" as defined above, then by section 89 (2) the "factory premises" to which Part III applies consist of

(a) the factory; and
(b) the remainder of any building in which the factory or any part thereof is situate; and
(c) any land contiguous to the factory which is in the occupation of the occupier of the factory and any buildings on that land.

From the definition of "factory premises" are excluded—

(a) buildings wholly or mainly occupied as a hotel or restaurant (other than for persons working in the factory);
(b) mines, except as mentioned below;
(c) premises wholly occupied by public utility undertakers for the purposes of their undertaking (such undertakers being governed by special provisions in Part V of the Act).

"Mine" means a mine within the Coal Mines Act, 1911, or within the Metalliferous Mines Regulation Act, 1872 (as amended by the Mining Industry Act, 1920, s. 19), or a quarry within the Quarries Act, 1894 (as amended by the Factories Act, 1937, s. 158) (s. 89 (3)). Where factory premises contiguous to a mine are

occupied by the owner of the mine, then if more persons work in or about the mine than in the factory, the factory premises are deemed to form part of the mine for the purposes of the Act; in the converse case the mine is deemed to form part of the factory premises (sub-section 4).

"Commercial building" means, by section 89 (5) a building in which more than fifty persons work, but there are excluded—

(a) a building wholly or mainly occupied as a school, college, university, hotel, restaurant, club, place of public entertainment or amusement, hospital or nursing home;

(b) a building wholly occupied by public utility undertakers for the purposes of their undertaking;

(c) any building forming part of any "factory premises" or "mine";

(d) a residential part of a building provided with a means of normal egress not available to occupants of the non-residential part.

In these definitions, the number of persons who work in premises means the greatest number of persons who are present therein at any one time in a normal day, being persons who carry on business therein or are employed by such. A temporary increase occasioned by a change of shifts is to be ignored, and outdoor workers (persons who, in a normal day, work in the premises for not more than one hour) are to be reckoned at 25 per cent. of their total number (section 89 (7)). Sub-section 8 lays down a somewhat more elaborate rule for determining the number of persons who work in or about a mine. What is a "normal day" may sometimes occasion difficulty in practice, and in some trades premises may become "factory premises" or a "commercial building" for a season only and then the provisions of the Act will apply. By section 89 (9) domestic servants and others employed in or for the purposes for a residential part of a building are excluded from the computation of the number employed.

Before turning from the above definitions it is desirable to note that where a factory comprises part only of a building, it is not a "factory" within the Act unless all the building is wholly occupied by the occupier of the factory. If that be so, then the whole building is "factory premises". Otherwise the whole building is, if it satisfies the other requirements mentioned above, a "commercial building", including the part which is a factory in popular language. The same rule applies in the case of a building which includes *part* of a factory.

The distinction is important because the duties imposed by Part III of the Act are imposed on the *occupier* of factory premises

and on the *owner* of a mine or commercial building. "Owner" includes a lessee for an unexpired term of ten years or more; if there are two or more such leases, the "owner" is the person in whom is vested that one of those leases on which all the others are reversionary. Where there is no such lease, "owner" means the fee simple owner. "Lease" does not include a mortgage, but the estate or interest of the owner of a commercial building is deemed to be vested in the mortgagee if the mortgagee is in possession or his receiver is in receipt of the rents and profits (section 90). "Occupier" is not defined, except in relation to unoccupied land, in which case it means, by section 90, the person entitled to possession.

The first duty of such person is under section 14 to make a report (with heavy penalties for default) not later than three months from the "appropriate date", which means the latest out of—

(a) the first issue or approval of a code under section 13;
(b) the making of an order applying Part III to the area or premises in question; or
(c) the fulfilment of the conditions specified in the respective definitions of "factory premises", "mine" or "commercial building".

The Minister has under section 13 issued a code prescribing requirements with which the shelter *must* comply, and giving advice as to incidental matters. A provisional code issued during the passage of the Bill through Parliament was approved by the Lord Privy Seal on August 13, 1939. A revised code has since been issued on August 18, 1939.

The report must, by section 14 (1), be made in writing to the factory or mines inspector in the case of factory premises or a mine, and to the local authority in the case of a commercial building, stating the measures taken, being taken or proposed by the occupier or owner (as the case may be) to provide air-raid shelter for the persons working or living in the factory premises or commercial building or working in or about the mine. The completion at a later date of works mentioned in the report must be reported in the same way.

"Local authority" in this part of the Act means the council of a county borough or county district (section 25), subject to the special provisions of section 84 as to the county of London.

The occupier of factory premises is by section 15 empowered to execute works for providing shelter of the approved standard on the premises, and the owner of a mine or commercial building is given like power as to providing shelter in any part of or

on any land appurtenant to the mine or building. But before commencing such works, the occupier of factory premises who is not the owner of the whole of the premises and the owner of a commercial building who is not the occupier of the whole building must serve notice upon certain specified persons stating

(i) his intention to provide shelter of the approved standard;
(ii) the nature and situation of the shelter, specified with such particularity as the occupier or owner thinks reasonably necessary;
(iii) the number of persons that the shelter is to be constructed to accommodate.

The occupier of factory premises is to serve such notice on each immediate landlord of any part of the premises, and the owner of a commercial building is to serve such notice on each immediate lessee and on each occupier. This is provided by sub-sections 2 and 3 of section 15, and in part repeated by sub-section 4, which also provides that an owner of a commercial building who is a leaseholder must serve a like notice on his immediate landlord, and every person who is served with such notice must similarly serve a copy within seven days on his immediate landlord, if any.

Provided that the occupier or owner exercising rights under section 15 complies with the requirements of the section, he will not be restrained by any limitation on his interest or by any agreement or restrictive covenant, or by the fact that, in the case of the owner of a commercial building, he is not in occupation of the part affected, and he will not be liable to pay damages for anything done by him which is reasonably necessary for the due exercise of the right. But the occupier of part of a commercial building may have a claim for compensation under section 19 (1).

If a factory or mines inspector or local authority (as the case may be) serves on the person responsible under this Part of the Act a notice in writing under section 16 requiring him to provide air-raid shelter of the approved standard for persons working or living in the factory premises or commercial building, or working in or about the mine, specifying with such particularity as the inspector or authority thinks reasonably necessary the nature and situation of the shelter and specifying the number of persons it is to be constructed to accommodate, and stating also the time within which it is to be provided and the fact that that time will begin to run twenty-eight days after the service of the notice or from the determination or abandonment of any appeal, then such person must under heavy penalties comply with the notice, and he may not exercise any power under section 15 except for the purpose of complying with the requirements of the notice.

Receipt of such a notice imposes upon the occupier or owner receiving it the obligation of serving within fourteen days a copy of the notice on all such persons as he would have been obliged by section 15 to serve with a notice had he intended commencing works under that section, and section 16 contains like provisions for the service, by each mesne landlord receiving a notice, of a copy on his immediate superior landlord.

A means is provided by section 10 whereby, if shelter cannot reasonably be provided in factory premises or a commercial building, the local authority for Part II of the Act may agree to provide, on such terms as to payments by the occupier or owner, as the case may be, as may be specified in the agreement, a public air-raid shelter which will be available for use by persons working or living in the factory premises or commercial building. Such provision of shelter by agreement in a public shelter will by section 16 (9) be deemed a compliance with a notice under section 16.

An appeal lies, by section 17, to the Minister when the machinery of either section 15 or section 16 is used. Where a notice is served under section 15 (2), or under section 16 (1), any person who was served thereunder with the notice, and also certain persons who under sections 18 and 19 may have to bear a proportion of the expense (by reason of a charge on the premises or an increase of rent), may within fourteen days, or twenty-one days where notice has been served by an inspector or local authority under section 16, appeal to the Minister on the ground that—

(a) the proposals or requirements of the notice are not appropriate, or are not those most appropriate to the circumstances of the case; or

(b) it is not reasonable to require the provision of any shelter in the case of the premises, mine or building.

Work must not be begun before the expiration of the time for appealing or, where an appeal is lodged, before the determination or abandonment of the appeal.

It is evident that the occupier of factory premises may under Part III of the Act incur expenses out of proportion to his interest in the premises, and accordingly section 18 provides for the distribution of the cost by a charge on the premises, provided the occupier complied with the requirements as to notices. The section itself must be referred to for the detailed provisions. The principle is that upon the determination of the occupier's tenancy within ten years of the date of the completion of the works, the interest expectant in reversion will, unless it is otherwise agreed, be charged in favour of the outgoing tenant with a sum which

bears to the net ascertained cost of the works the proportion which the unexpired part of the ten years bears to the whole of that period. Moneys provided by Parliament are to be deducted from the actual cost. If not agreed by all persons entitled to interests which may become subject to such a charge, the " net ascertained cost of the works " will have to be decided by reference to an official arbitrator under section 74. Such proceedings *must be commenced within six months of the completion of the works.* The proviso to sub-section 3 is not very clearly expressed, but seems to be designed to meet the case of an occupier of factory premises whose title to different parts of the premises is derived under different tenancies, possibly from different landlords. In such case he is entitled to a charge on each reversionary interest, the net ascertained cost of the works being divided in proportion to the annual value of the parts held under the respective tenancies. Attention has already been drawn to the definition of " annual value " in section 90. Any additional expense incurred through providing a greater degree of protection or accommodation than is contemplated by the code will not be regarded as part of the " net ascertained cost of the works ". The charge is registrable as a land charge of Class A and has with certain specified exceptions priority over all other incumbrances. Sub-section 6 provides for the case where the local authority has agreed to provide a public air-raid shelter for the use, in whole or in part, of persons working or living in the premises, the sums which the occupier so becomes liable to pay being treated as if they were expenses incurred in executing works. It is further provided by sub-section 5 that the provisions of the section apply notwithstanding any term of the tenancy requiring the tenant to pay outgoings or any similar term. It is submitted that " any similar term " refers only to expressions of a general nature, such as " charges ", " impositions ", etc., and does not avoid an express agreement that the tenant shall bear the cost of constructing an air-raid shelter.

The converse case, where the owner, under the provisions of Part III of the Act, executes works in a commercial building of which he does not occupy the whole, is dealt with by section 19. Where such an owner executes works in a part of which he is not the occupier, the occupier is entitled to compensation for any damage he has sustained through interference with his use of the building during the execution of the works. Such compensation will be a charge on the estate of the owner, the charge being similar to the occupier's charge under section 18.

Where the usefulness of part of a commercial building is impaired by the execution of works under Part III of the Act, the rent

reserved by an existing lease of that part of the building is by section 19 (2) to be decreased unless it is otherwise agreed. By sub-section 3, the decrease is to be at an annual rate equal to the diminution of the annual value of the part of the building ascribable to the impairment, ascertained as at the date of the completion of the works. Reference has already been made to the definition of "annual value" in section 90, and the general definition there first set out applies without qualification to the calculation of a decrease of rent under section 19 (2) and (3).

The loss so incurred to the owner and his expenditure upon the shelter may be re-imbursed to him by an increase of rent under sub-sections 4—12 of section 19. This increase is conditional upon the proper procedure having been observed as to the service of notices and copies, and it seems that a failure to serve a single person who should have been served will prevent any person being charged the increase. The annual increase permitted is based on the total of—

(a) one-tenth of the expenses of the owner under the notice;

(b) any diminution of the annual value of any part of the building ascribable to an impairment of the usefulness thereof by reason of the execution of the works ascertained as at the date of the completion of the works.

The increase of rent which may be made in respect of each part of the commercial building is a share of the above total proportionate to the annual value of the part as compared with the annual value of the whole, at the date of the completion of the works. Where the parts are separately valued for rating purposes, the proviso to the definition of "annual value" in section 90 will come into operation for determining the proportionate increase of rent. The annual value of the part (except a part which has *depreciated* in value by reason of the execution of shelter works under the Act) is then taken to be the rateable value appearing at the material date in the valuation list, or the net annual value where that differs from the rateable value, and the annual value of the whole is taken to be the sum of the annual values of the parts. The increase, which is not to operate for more than ten years, is chargeable only in respect of any rent period beginning after the date of the completion of the works; it may operate concurrently with and be set off against a decrease of rent under sub-section 2.

The expenses which may be included in calculating the increase are by sub-section 8 the expenses reasonably incurred by the owner in providing shelter of the approved standard in pursuance of the notice (limited, however, to the expense of providing a degree of

protection and accommodation not greater than is contemplated by the code) together with—

(a) the amount of any compensation properly paid by the owner under section 19 (1) for interference during the execution of works; and

(b) the amount of any compensation which the owner would have been entitled to recover under that sub-section as the occupier of part of the building had he not also been the owner.

A lessee who proves that he or his predecessor in title was not a person on whom the notice or a copy thereof was required to be served and had no reasonable opportunity of appealing against it, and that he has accordingly suffered damage, is entitled to such reduction in the amount of his increase of rent "as may be just" (sub-section 9). A surety for rent is not discharged by, but is not liable for, the increase (sub-section 10). An increase which may be claimed under section 19 cannot be claimed under an agreement to pay outgoings (sub-section 11). By sub-section 12 the provisions as to increase of rent are made applicable to the case where the local authority agree to provide a public air-raid shelter for the use, in whole or in part, of persons living in the building.

Any person who, having an estate or interest in factory premises or a commercial building, has before July 13, 1939, commenced works for providing air-raid shelter of the approved standard, may under section 20 apply to an official arbitrator (see section 74) for an order for the payment of contributions by such of specified persons as the arbitrator considers just. The arbitrator has wide powers of setting aside agreements made before the Act and ordering the form of contributions. The expenses towards which contributions may be ordered are defined in sub-section 4.

It is expressly laid down by section 21 that the occupier of factory premises or the owner of a mine or commercial building is not prevented from doing anything to provide air-raid shelter which he would have been entitled to do if Part III of the Act had not been enacted, unless the doing thereof is inconsistent with a notice duly served on him under Part III of the Act.

Exchequer grants of $27\frac{1}{2}$ per cent. (see section 22 (3)) are provided for by section 22 in respect of the provision of air-raid shelters for factory premises, mines, commercial buildings and certain other premises, provided that the shelter was made before the end of September, 1939, or work was at that date in progress or preparatory measures were then being taken and the

Minister is satisfied that the shelter will be provided within a reasonable time thereafter.

Other Provisions as to Shelter.

Part IV of the Act regulates, amongst other matters, the erection of the individual shelters provided by the Crown to householders in certain areas. Provided the occupier erects the shelter in accordance with advice given by the local authority (as to the definition of which see section 35, and as to the duties of which see section 26 (1)), he has a special power under section 26 (2) to erect the shelter and to break up the surface of any land in his occupation whether paved or not, notwithstanding any agreement or restrictive covenant to the contrary, and notwithstanding any limitation on his interest in the premises. He is not liable in damages for any act reasonably necessary for the due exercise of this right or, if he has exercised due care, for any damage done by him to drains, sewers, pipes, cables or "other works" (seemingly to be construed *ejusdem generis*), but he is expressly placed under a duty to exercise such care. The local authority giving advice are also placed under a duty by sub-section 3 to "exercise such care as is reasonable in the circumstances of the case", and unless they fail to exercise such care they are not liable for damage caused by or in consequence of the erection of a shelter in accordance with advice given by them. It would seem that reasonable care on the part of the local authority would include, for example, the locating of drains, cables, etc., and precautions against an excavation weakening any foundation, wall or other structure. A local authority erecting a shelter themselves enjoy the same powers as an occupier erecting it in accordance with their advice (sub-section 4). Erection of a shelter includes, for the purposes of this Part of the Act, affixing the shelter to or embedding it in any part of the premises and the carrying out of any other works necessary for the proper erection of the shelter. It is submitted that reasonable care on the part of the local authority will always involve proper examination of the structure of any part of the premises to which they advise or propose affixing a shelter. Public utility undertakers not guilty of negligence are freed from liability for injury, etc., resulting from damage done by any occupier to any pipe, cable or other work in exercising powers under the section.

Where the occupier of a basement has been provided free of charge by the Crown with appliances for strengthening it for use as a shelter, it is, under section 27, the duty of the local authority,

unless the occupier refuses consent, to affix the appliances and to take such steps as appear desirable in order to provide additional exits from the basement or in order to enable additional exits therefrom to be readily provided. The local authority are for these purposes given special powers to execute such works as may be necessary in the basement *or elsewhere in the building*, including works in any party wall or in or under any adjacent highway or any land occupied or used in connection with the building. The local authority must repay to public utility undertakers the expense of making good any damage to mains, pipes, etc.

Both sections 26 and 27 are deemed to have had effect from the commencement of the Act of 1937.

Materials for an air-raid shelter or appliances for strengthening a basement provided free of charge by the Crown with the consent of the recipients may not be removed from the premises for which they were provided without the consent in writing of the authority, and a shelter erected or appliances affixed by the local authority may not be removed from its position without such consent (section 28).

Provision is made by section 29 for loans by local authorities to owners (including lessees with an unexpired term exceeding three years) of dwelling-houses in certain areas for the purpose of enabling air-raid shelter of a permanent character to be provided.

Residential Buildings and Blocks of Buildings.

Shelter in respect of buildings or blocks of buildings wholly or mainly used for residential purposes and let out in separate parts is, in respect of areas specified by the Minister, provided for by section 30. The section does not apply (a) to any part of the building or block which is factory premises or a commercial building, nor (b) to a building or block owned by a local authority or (c) the majority of the occupiers of which fall within classes provided free of charge by the Crown with materials for air-raid shelter. Any question as to whether (c) applies is to be determined by the Minister.

The owner of a building or block of buildings to which the section applies *must* prepare a scheme for air-raid shelter in or near the building or block for persons living and working therein if he is so required by more than one-half in number of the occupiers of the separate parts of the building or block. He *may* prepare a scheme in any other case. The scheme must state the situation and general nature of the shelter, the number of persons to be accommodated, its estimated cost exclusive of compensation,

and whether any and if so what compensation is proposed (a) to be paid to persons having an estate or interest in the premises in which the shelter is to be provided, (b) to be allowed to the owner in respect of his interest in the premises in which the shelter is to be provided. The scheme must also contain a statement of the provisions of section 30 as to increases of rent and may contain such other information as appears to the owner to be relevant. A copy of the scheme must be served upon every occupier. "Owner" has the same meaning as in relation to a commercial building.

Unless the occupiers of more than half in number of the separate parts of the building or block dissent, it is provided by sub-section 5 that the owner *shall* carry the scheme into effect. No penalty is provided, however, for failure to do so, and the section contains no powers of entry for the landlord either to survey preparatory to a scheme or to do works necessary to carry a scheme into effect. A dissenting tenant may therefore refuse to permit his premises to be used for purposes of shelter. Sub-section 9 expressly provides that nothing in the section shall be construed as authorising the owner of any building or block of buildings to enter any premises or land or do any work therein, if he would not have been entitled to enter or do that work apart from the provisions of the section.

Upon completion of the scheme the owner may increase the rent payable under leases derived from him and in existence at the date of completion of the shelter. Unless otherwise agreed the increase is by sub-section 6 based upon the total of

(a) the owner's expense in providing the shelter;

(b) compensation to persons having an estate or interest in the premises in which the shelter is provided; and

(c) compensation reasonably allowed to the owner in respect of his interest in the premises in which the shelter is provided :

provided that in each case the sum taken is that mentioned above *or the corresponding sum mentioned in the scheme, whichever is the less.* The total is to be multiplied by the proportion borne (at the date of completion of works) by the annual value of each part to the annual value of the whole building or block, and the annual increase for each part will be one-eighth of the sum so arrived at, to operate for not more than ten years as from the first rent period beginning after the date of completion of the shelter. There is a special proviso to the definition of "annual value" in section 90, which is applicable to the calculation of this increase of rent wherever the parts are separately valued for rating purposes : this proviso has already been considered above in relation

to commercial buildings. A surety for rent which is increased under the section is not discharged by, but is not liable for, the increase.

Where a residential building or block of buildings is occupied mainly by persons of those classes who are provided free of charge by the Crown with materials for air-raid shelter, and there is adjacent to the building or block land used in common by the occupiers, a request in writing, signed by more than half the occupiers of the separate parts of the building or block, that the local authority shall utilise that land for an air-raid shelter will confer upon the local authority a right to enter and execute works as though all persons interested had concurred therein (section 31).

By section 32 the fee simple owner or any lessee for an unexpired term of more than three years may execute any works for the purpose of providing air-raid shelter in a dwelling-house or in or on any land belonging to or occupied with the dwelling-house, notwithstanding any limitation on his interest in the dwelling-house or land or any agreement or restrictive covenant to the contrary. This section operates as from the commencement of the Act of 1937.

Attention may also be drawn to the Minister's power under section 33 to make building regulations from the point of view of civil defence.

Miscellaneous Provisions of the Civil Defence Act.

Amongst the other provisions of the Act the following have an important bearing on property law :—

By section 57, which has already been mentioned in connection with the taking possession of designated premises, the making of an order by the Minister declaring the provisions of the section to be in operation (on the ground of imminent emergency) has the further effect of entitling the Commissioners of Works to *take possession of* any premises which in their opinion should be available for a Government department or other persons acting on behalf of the Crown in a civil capacity. The section enables possession to be retained for three months after the making of the order.

By section 67 the property in equipment, appliances or material provided free of charge under the Act of 1937 remains in the Crown, notwithstanding affixation to any premises; likewise, notwithstanding affixation, equipment, appliances or material used in the execution of works by a local authority under Part II or Part IV of the 1939 Act remain the property of the local authority.

By section 70 the object of rendering an area less vulnerable to air-raids may be included under a town planning scheme.

Provision is made by section 74 for determining by arbitration questions as to compensation and increases or decreases of rent, and by section 80 for service of documents required or authorised to be served under the Act.

By section 82 " nothing in any covenant or agreement requiring any person to keep specified premises in, or to restore specified premises to, a particular condition shall authorise or compel any person to interfere with any works executed on those premises under this Act, or subject him to any liability if he does not do so ".

THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939.

By Lionel A. Blundell, LL.M., Barrister-at-Law.

One of the war-time measures which came into operation immediately after the outbreak of war was a new Rent Restrictions Act bringing under control as from September 2, 1939, the vast majority of the dwelling-houses in this country. This new Act may conveniently be considered here in two parts, namely, (a) the provisions affecting houses which were controlled at the commencement of the 1939 Act, that is to say, September 2, 1939, and (b) the provisions now governing houses which were not previously controlled. The Act was, by virtue of section 9 (4), brought into operation by Order in Council on September 2, 1939.

(a) *Houses Already Controlled.*

Dwelling-houses which were controlled immediately before the commencement of the Act of 1939 remain subject to the provisions of the Acts of 1920 to 1938, with certain amendments introduced by the Act of 1939. Section 1 of the Act of 1938, which limited the duration of the principal Acts to June 24, 1942, is repealed, and by section 1 of the 1939 Act the Acts are to continue in force until six months after the date declared by Order in Council to be the date when the present emergency comes to an end. No doubt the Acts will not then be allowed to lapse but will be continued in force by further amending statutes.

Decontrol by actual possession or by the grant of a lease is now abolished even in those few cases which survived the Act of 1938. This is effected by section 2 of the new Act, repealing section 3 (2) of the Act of 1938. The effect of this seems to be that henceforth houses subject to pre-war control will for practical purposes be of one class only and subject to one set of rules. But this does not mean that the old rules distinguishing between Class "A", "B" and "C" houses can be forgotten : it is still of great importance to know whether or not a house was controlled prior to the commencement of the 1939 Act, and for the purpose of deciding this question all the old law governing control and decontrol is relevant. If a house had, prior to the commencement of the Act of 1939, become decontrolled under the law then in force, it comes under the 1939 Act as a newly controlled house

with the benefit of a 1939 instead of a 1914 standard rent. So although, to take an example, the registration provisions of the Acts of 1933 and 1938 are all swept away by the Act of 1939, the recoverable rent of a dwelling-house may still turn upon a question whether the house was required to be or was in fact duly registered as decontrolled under the Act of 1933 or the Act of 1938.

In this connection the effect of the Schedule of Enactments repealed by the Act of 1939 must not be misunderstood. Many of the provisions thereby repealed will continue to be of great importance in determining whether a house was subject to pre-war control or not. Thus, in addition to the registration provisions mentioned above, section 1 (2) of the Act of 1933 remains important, though now repealed, because it defines what houses remained controlled after the passing of the 1933 Act. The same remark applies to the definitions of " appointed day " and " rateable value on the appointed day " in section 16, sub-section 1 of the Act of 1933. These definitions are now repealed by the Act of 1939, but their application prior to the commencement of the Act of 1939 may frequently be a decisive factor in the calculation of the recoverable rent of a house.

To sum up the position, all houses controlled immediately prior to the commencement of the new Act remain controlled as one class of controlled dwelling-houses, and the old law of decontrol and registration now repealed is important for deciding whether a dwelling-house falls within that class or not.

In addition to the complete abolition of decontrol by actual possession, the present position of pre-war controlled houses is further modified by the repeal of section 5 of the Act of 1933, which had exempted certain dwelling-houses with a recoverable rent of not more than three shillings weekly from the provisions of the Acts restricting the right to possession. It is curious to note that this section is repealed twice over by the Act of 1939, in section 5 and in section 9.

(*b*) *Houses not Previously Controlled.*

By section 3 of the Act of 1939 all houses not controlled immediately before the commencement of the new Act and having a rateable value on *the appropriate day* not exceeding £100 in the metropolitan police district or the city of London, £90 in Scotland, or £75 elsewhere, are brought within the ambit of the Rent Acts and become controlled dwelling-houses.

The expression " the appropriate day " must be distinguished from the " appointed day " of earlier Acts. " The appropriate

day " is defined in section 7 and means, in the county of London, April 6, 1939. In the remainder of England and Wales it is April 1, 1939, and in Scotland it is May 16, 1939. The expression " rateable value on the appropriate day " in relation to any dwelling-house means the value shown, with respect to that dwelling-house, on that day in the valuation list then in force, as the rateable value or, where the net annual value differs from the rateable value, as the net annual value. Apart from these special definitions, expressions have the same meaning as in the Act of 1933. Where the rateable value of a dwelling-house on the appropriate day was not on that day separately assessed, the rateable value of the dwelling-house on the appropriate day is, by section 7 (2), to be an apportioned part of the rateable value on that day of the property in which the dwelling-house is comprised. The apportionment will be by the county court under section 12 (3) of the Act of 1920. If a dwelling-house is first assessed after the appropriate day, the material figure is by section 7 (3) of the new Act its rateable value on the day on which the dwelling-house was first assessed. This will only apply where the dwelling-house had not been assessed *at all* on or prior to the appropriate day, either separately or as part of a larger property.

The Acts apply to the newly-controlled dwelling-houses with the same amendments which have already been mentioned above in dealing with the houses subject to pre-war control, so that there will be no decontrol by actual possession. There are in addition many new provisions amending the principal Acts in their application to the newly controlled houses, with the result that the code governing this class of houses differs in many respects from that now governing the houses falling within the pre-war controlled class.

It is proposed now briefly to summarise the special provisions applicable to the newly-controlled houses.

The Act of 1939 does not control a dwelling-house consisting of, or comprising, premises licensed for the sale of intoxicating liquor for consumption *on the premises*. But off-licence premises fall within the general rule (section 3 (3)) that, subject to the above provision, the application of the Acts to a house of the newly controlled class shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes. This corresponds with section 12 (2), proviso (ii), of the Act of 1920.

It is further provided by section 3 (3) of the Act of 1939 that for the purposes of the Act, as amended by virtue of section 3, " any land or premises let together with a dwelling-house shall,

unless the land or premises so let consists or consist of agricultural land not exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house". This provision requires careful consideration. It replaces, as regards the newly-controlled class of houses, section 12 (2), proviso (iii) of the Act of 1920, whereby land or premises let together with a house are to be treated as part of the house *if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house*: otherwise the Acts are not to apply to a house let together with land other than the site of the house. Since land includes buildings as well as agricultural land, the effect of the earlier enactment was that a dwelling-house let with factory premises of a rateable value of one quarter or more of the rateable value of the house was excluded from the operation of the Acts: see in this connection *Stanton* v. *Laws*, [1934] W. N. 193. But now, in the case of a house becoming controlled under the 1939 Act, such premises (not being agricultural land) will be treated as part of the dwelling-house, and the rateable value of both combined will be the material figure for determining whether or not the house and premises are controlled. It is in this case of no consequence what proportion of the rateable value of the whole is contributed by the other premises let with the dwelling-house. If, however, the land or premises let with the dwelling-house consist of agricultural land exceeding two acres in extent, the Acts will not apply to the dwelling-house. It is believed that the new enactment is more in line with what was originally intended, though not achieved, by the draftsmen of section 12 of the Act of 1920.

The 1939 Act does not bring under control, save as is expressly provided in the principal Acts, any dwelling-house *bona fide* let at a rent which includes payment in respect of board, attendance or use of furniture (section 3 (2)). This reproduces a corresponding provision in section 12 of the Act of 1920. The section must be read with section 10 of the Act of 1923, whereby a dwelling-house is not deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. For the cases on this enactment, which will still apply under the new Act, see Woodfall's *Law of Landlord and Tenant* (24th ed.), p. 349.

There are also excluded from the operation of the 1939 Act all houses in respect of which a local authority are required by the Housing Act, 1936, s. 128, to keep a Housing Revenue Account, other than dwellings to which section 129 (3) applies. This excludes from the Rent Act houses provided by a local authority under Part V of the Housing Act, 1936.

Where a house was not controlled immediately prior to the commencement of the 1939 Act, but is brought under control by that Act, the Acts of 1920 to 1933 are modified in their application by the amendments set out in the First Schedule to the Act of 1939. In this Schedule, the wording of section 1 of the Act of 1920 is amended so as to make any increase over the standard rate of interest of a mortgaged house irrecoverable, and the control of rent is made to apply to all increases since September 1, 1939. Section 2, governing permitted increases in rent, is severely restricted in its application. The permitted increases for newly-controlled houses are :—

(a) Where the landlord has since September 2, 1939, incurred, or hereafter incurs, expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs), an amount calculated at a rate *per annum* not exceeding 8 per cent. of the amount so expended. The power to apply to the county court for an order suspending or reducing the increase remains, together also with the provisions of the 1933 Act, s. 7, governing increases under this paragraph.

(b) An amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included September 2, 1939, or in the case of a dwelling-house for which no rates were payable in respect of any period which included the said date, the period which included the date on which the rates first became payable thereafter. The amendment effected by section 7 (2) of the Act of 1938 still applies in relation to compounding allowances.

It should be clearly understood that the above are the only increases of rent permitted in respect of newly controlled houses, and the remainder of section 2 (1) of the Act of 1920 does not apply. Moreover, section 7 of the Act of 1923, dealing with permitted increases in the case of sub-tenancies, does not apply. Consequential upon the exclusion of the increase in respect of landlord's liability for repairs, sub-sections 2 and 4 of section 2 of the Act of 1920 are excluded; sub-section 3 remains, however, dealing with transfers of liability to the tenant, and sub-section 5, defining repairs, still has a limited application. Questions arising

under the section will still be determined by application to the county court under sub-section 6.

The law as to notices of increase of rent is not altered, section 3 (3) of the Act of 1920 being made to refer to the commencement of the new Act instead of to the passing of the 1920 Act.

Section 4 of the 1920 Act, dealing with the permitted increase in the rate of mortgage interest, does not apply.

Restrictions on the recovery of possession, as governed by the new section 5 of the Act of 1920 which was enacted by the 1923 Act, s. 4, and the First Schedule to the Act of 1933, suffer only consequential amendments to bring them into line with the new dates. Section 5 (3) of the Act of 1920 is replaced by a corresponding provision in section 4 of the 1939 Act applying the Act to pending proceedings.

The restrictions imposed by section 6 of the Act of 1920 on the levying of distress for rent apply with consequential amendments only, as also do the restrictions of section 7 on the calling in of mortgages. Section 8, restricting the requirement of premiums, applies with minor amendments. The material date since which an agreement to pay a premium is invalid is September 1, 1939. The proviso to section 8 will read to the effect that where any agreement has been made since September 1, 1939, but before September 2, 1939, and includes provision for the payment of any premium, etc., that agreement is voidable at the option of either party thereto. Having regard to the operative dates there would seem to be no agreements to which the proviso can apply.

The limitation imposed by section 9 of the Act of 1920 on the rent of houses let furnished will apply as follows in respect of the newly controlled houses : Where any person lets, or has, since the beginning of the date of the passing of the Act of 1939 (September 1, 1939), let any controlled dwelling-house, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the Court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after September 2, 1939, shall be repaid to the tenant. It is to be noted that the margin of 25 per cent. excess formerly allowed is taken out of the section. "Normal

profit" means the profit which might reasonably have been expected from a similar letting in the year ending September 2, 1939. Section 10 (which provides a penalty for excessive charges for furnished lettings) is brought into line by deletion of the reference to the margin of profit allowed under section 9, and is made to apply as from September 2, 1939.

The standard rent or standard rate of interest of the newly controlled houses is calculated by reference to September 1, 1939, the day before the commencement of the Act. The figure to be taken is the rent at which the dwelling-house was let on that date, or, where it was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after that date, the rent at which it was first let. The proviso to section 12 (1) (a) of the Act of 1920, dealing with houses let at a progressive rent or at a rent less than the rateable value, still applies. It should be particularly noted that where a house is let for the first time after September 1, 1939, the rent at which it is so let becomes the standard rent for the purpose of the Rent Restrictions Acts. The rateable value for the purpose of the Act is the rateable value on the appropriate day, defined as already set out above; in the case of a dwelling-house first assessed after April 6, 1939, or April 1, 1939, as the case may be, the material date for determining the rateable value is the day on which the dwelling-house was first assessed.

Section 12 (2) of the Act of 1920 (defining the limits of the application of the Act) does not apply, being replaced by provisions of the new Act already referred to above. Whereas under the Act of 1920 the house was controlled if either the annual amount of the standard rent or the rateable value (on August 3, 1914) did not exceed the limits specified, under the new Act the sole test is the rateable value of the dwelling-house. Section 12 (4) of the Act of 1920 (defining the mortgages to which the Act applies) is modified in its application to the newly controlled houses, inasmuch as exception (c), excluding from the Act mortgages created after the passing of the Act, does not apply.

A further provision which is excluded in the case of the newly controlled class of houses is section 12 (9) of the Act of 1920, exempting dwelling-houses erected after or in course of erection on April 2, 1919, or which have been since that date or were at that date being *bona fide* reconstructed by way of conversion into two or more separate and self-contained flats or tenements. Nevertheless it might be argued from authority that a dwelling-house constructed after the passing of the Act would not be controlled. "Dwelling-house"

has, by section 7 (1), the same meaning as in the Act of 1933, where it is defined (see section 16 (1)) as " a house let as a separate dwelling or a part of a house being a part so let ". This definition was the subject of judicial interpretation in *Brooks* v. *Brimecome*, [1937] 2 K. B. 675, where the Court of Appeal construed it as meaning a house, etc., so let at the time of the passing of the Act. Now that the same definition is incorporated into the Act of 1939, it might be contended that a house, to be a dwelling-house within the meaning of the Act, must have been let at the time of the passing of the new Act. But this is inconsistent with section 12 (1) of the Act of 1920, which as applied to the newly-controlled houses, expressly makes provision for fixing the standard rent of houses first let at some date after September 1, 1939.

Another provision of the Act of 1920 which does not apply is section 12 (10), dealing with houses taken by a Government Department under Defence of the Realm Regulations for housing workmen.

Consequently amendments are made in section 14 to apply that section to the recovery of overpayments made since the Act of 1939.

In the Act of 1923 it has already been noted that section 7, dealing with permitted increases of rent in the case of sub-tenancies, does not apply. Another provision which is excluded as inapplicable is section 3, whereby the landlord was enabled to determine certain tenancies extending beyond June 24, 1923. A necessary amendment is made in section 8 (2) to make over-payments made prior to the Act recoverable within two years (see 1938 Act, s. 7 (6)) of the commencement of the 1939 Act but not afterwards, and section 10 of the 1923 Act, which defines what houses may be deemed to be let at rents which include payments in respect of attendance or the use of furniture, is made to apply as a qualification of section 3 (2) (b) of the 1939 Act.

A number of important amendments are made also in the 1933 Act in its application to the newly controlled houses. The provisions which do not apply are section 1 (3) (replaced by section 3 (2) (a) of the 1939 Act); section 5 (which is repealed in any case by the Act of 1939); and section 9 (dealing with mortgaged property decontrolled by the 1933 Act). Consequential amendments are made in section 4 (4) (statements of subletting) and in section 6 (ascertainment of standard rent) to make them refer respectively to September 2 and to September 1, 1939. Similarly in paragraphs (d) and (h) of the First Schedule the dates mentioned are changed to September 1, 1939.

Subject to the modifications mentioned above, the whole of the Rent Restrictions Acts as at present in force apply as from September 2, 1939, to the class of dwelling-houses newly controlled by the Act of 1939. Moreover, under section 4 of the new Act, even where an order or judgment has been made or given before September 2, 1939, the Court has a discretionary power to rescind or vary the order or judgment for the purpose of giving effect to the Act.

By the Rent (Restrictions) Rules, 1939, the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, are made applicable to proceedings under the new Act.

The Rent Restrictions Regulations, 1939, prescribe certain forms of notices.

Although the Rent and Mortgage Interest (Restrictions) Act, 1939, is a short enactment of only nine sections, it will be seen from the above explanation of its terms that it contains comprehensive provisions which are far-reaching in their effect, bringing under control the vast majority of dwelling-houses in the country. It may be thought that the question whether a house is actually controlled or decontrolled is not likely to arise now in nearly so many cases as heretofore. A house falling within the limits of rateable value specified by the new Act may still become decontrolled by falling within one of the exceptions named in sub-sections 2 and 3 of the 1939 Act, but otherwise it cannot be decontrolled under this Act; and, as has been seen, decontrol under the old Acts is of no avail in the case of any house falling within the rateable value limits set by the new Act. But a decontrolled house which is decontrolled by the 1939 Act comes under control on the basis of a 1939 standard rent, just as if it were now controlled for the first time. It is to be anticipated that more often than not in disputed cases under the new Act the practical question in issue will be whether the rent is to be calculated on the 1914 or the 1939 basis. The determination of that issue involves the question whether or not the house was controlled immediately before the commencement of the Act of 1939, and so a case may frequently turn not so much upon the current law of rent restriction as upon previous law now repealed.

An interesting question arises whether the increase of rent allowed by section 30 of the Civil Defence Act, 1939, is made irrecoverable in respect of houses controlled by the new Act.

THE COURTS (EMERGENCY POWERS) ACT, 1939 (as affecting landlord and tenant law).

By L. A. Blundell, Barrister-at-Law.

The Courts (Emergency Powers) Act, 1939, which came into operation by Order in Council on September 2, 1939, protects persons who suffer hardship as a result of the outbreak of war by giving the Courts a discretionary power over the enforcement of any pre-war debt or obligation by any form of execution. The provisions of the Act dealing with mortgages are explained elsewhere.

By section 1 (1), a person cannot without leave of the appropriate Court proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money. This is subject to certain exceptions which include, *inter alia*,

(a) any judgment for the recovery of damages for tort;

(b) any judgment or order for the recovery of a debt which has become due by virtue of a contract made after the commencement of this Act;

(c) any judgment or order under which no sum of money is recoverable otherwise than in respect of costs.

This sub-section will necessitate the leave of the Court before execution can be levied in respect, for example, of a judgment for arrears of rent or for damages for breach of covenant; but no leave is required for the levying of execution in respect of costs awarded to the successful party upon the dismissal of a claim, no sum of money being recoverable otherwise than in respect of costs.

The Court whose leave is to be procured is by rule 2 of the Courts (Emergency Powers) Rules, 1939, and also by rule 2 of the County Court (Emergency Powers) Rules, 1939, the Court by which the appropriate order has been given or made, or in which the judgment or order is being sought. In proceedings under the Debtors Act, 1869 (which regulates judgment summonses), the appropriate Court is the Court in which the enforcement of the judgment is being sought.

By sub-section 2 a person may not without leave of the appropriate Court proceed to exercise any remedy which is available to him by way, *inter alia*, of

(i) the levying of distress;

(ii) the taking possession of any property or the appointment of a receiver of any property;

(iii) re-entry upon any land.

This does not apply to a remedy available in consequence of any default in the payment of a debt, or the performance of an obligation, being a debt or obligation arising by virtue of a contract made after the commencement of this Act. This sub-section will apply even to a peaceable re-entry under a proviso for re-entry for breach of covenant. The remainder of sub-section 2 relates to securities, mortgages, etc.

Under the above provisions of sub-section 2 the appropriate Court is, by rule 4 of the Courts (Emergency Powers) Rules, 1939, the High Court in any case, or the county court as an alternative to the High Court in the following cases:—

(a) For the levying of distress, where the amount for which distress is sought to be levied does not exceed £100.

(b) For entering into possession of land or . . . for re-entry upon land, where neither the value of the land nor the rent payable in respect thereof exceeds £100 by the year.

But it is expressly laid down that where the High Court and a county court have concurrent jurisdiction under this rule, the application shall not be made to the High Court except in special circumstances: an application to the High Court which ought in the opinion of the Court or Judge to have been made to a county court may be ordered to be transferred there. Where leave is required for the purpose of taking proceedings in a county court the application for leave is to be made to the Court in which the proceedings are to be taken; in any other case the appropriate county court is the one for the district in which the respondent or one of the respondents resides or carries on business or the subject-matter of the application is situate. The provisions of this rule are repeated in rule 4 of the County Court (Emergency Powers) Rules, 1939.

By sub-section 3 a person may not without leave of the appropriate Court proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether given or made before or after the commencement of this Act) for the recovery of possession of land in default of payment of rent: again, this does not apply to proceedings for the enforcement of a contract made after the commencement of the Act. It is to be observed that under sub-section 2 leave is required since the commencement of the Act before proceedings may be instituted to enforce a forfeiture for non-payment of rent, and an order for possession having been obtained such order cannot by sub-section 3 be

enforced without again obtaining leave of the Court. The appropriate Court is in this case, by rule 5 of both High Court and County Court Rules, the Court by which the judgment or order has been given or made or in which the judgment or order is being sought.

By section 3 a contract is deemed to have been made before the commencement of the Act if an offer made before the day of the commencement thereof so as to be binding on a contracting party if accepted within a specified period expiring on or after that day, is accepted by the contracting party at any time within that period. Subject to this, the ordinary rule will apply that the contract is deemed to be made when the offer is accepted. The Act does not afford any guidance as to the position where, as a result of a preliminary contract entered into prior to the Act, a lease is executed after the commencement of the Act. It is suggested that if the preliminary contract was capable of enforcement either at law or in equity as a binding agreement for a lease, and was merely implemented by a more formal document later, the contract is to be regarded as having been made prior to the Act : in other cases (as where an agreement is made *subject to* the execution of a proper lease) the time of execution of the lease would appear to be the date of the making of the contract for the purpose of the Act.

The discretion of the Court upon an application for leave is to be exercised in accordance with section 1 (4), which enables the Court to refuse leave or to affix such restrictions or conditions as it thinks proper where it is of opinion that the person liable to satisfy the judgment, debt, obligation, etc., is unable immediately to do so by reason of circumstances directly or indirectly attributable to the war.

Mention has already been made of the Courts (Emergency Powers) Rules, 1939, which have been made by the Lord Chancellor under section 2 and govern High Court proceedings under the Act as well as proceedings in Courts of summary jurisdiction. Space does not permit a detailed examination of those Rules here, but attention may be drawn to the rules governing proceedings in the High Court, whereby a plaintiff in an action to which sub-section 1 or sub-section 3 applies may serve with the writ of summons a notice in the specified form with counter-notice attached (rule 8). The effect of this is that if the defendant does not enter an appearance or file in or send to the office or registry a counter-notice giving an address for service, application for leave to proceed may be made *ex parte*. If the defendant does not appear but files or sends a counter-notice giving an address for service, the plaintiff

may, after judgment has been entered, apply by summons for leave to proceed (rule 8 (3)). If the defendant enters an appearance, and no judgment or order has been given or made, application for leave to proceed may be made at the time when the judgment or order is given or made in the presence of the other side on notice given in the prescribed form (rule 9). Where a judgment or order has been given or made, the application for leave to proceed may be made by summons in the proceedings (rule 10).

An application under section 1 (2) (a) for leave to distrain, re-enter upon land, etc., is to be by originating summons which must include a prescribed form of statement. The respondent is not required to enter an appearance to the originating summons.

The County Court (Emergency Powers) Rules, 1939, contain provisions corresponding to those applying to High Court procedure. Some of these provisions have been noted above. A plaintiff commencing a default action to which sub-section 1 applies may include in the præcipe a statement that he requires a notice under the Act to be served with the default summons (rule 8). Then if judgment is entered for him in default the plaintiff may apply *ex parte* for leave to proceed; if the defendant delivers a defence or an admission and request for time for payment, or a counterclaim, and judgment is given or entered for the plaintiff, the plaintiff may apply for leave to proceed at the time when judgment is given or entered without further notice to the defendant, or at any subsequent time on notice under Order XIII, r. 1.

In an action or matter to which sub-section 1 or sub-section 3 applies, an application by the plaintiff for leave to proceed may by rule 9 be made at the time when the judgment or order is given or made in the presence of the other side, or at any subsequent time on notice. A form of notice for either case is prescribed by the rules. This rule does not apply to a default action where a notice in the proper form has been served with the default summons.

An application under sub-section 1 for leave to enforce a judgment or order under section 5 of the Debtors Act, 1869, may be made at the hearing of the judgment summons on notice in the proper form incorporated with or annexed to and served with the judgment summons.

An application under sub-section 2 for leave to distrain or exercise some other remedy specified in paragraph (a) of sub-section 2 is to be by originating application. In the case of leave to distrain the application may be heard either in Court or in chambers and determined by the Registrar, subject to appeal to the Judge under Order XXXVII, r. 5.

THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939.

By B. A. Bicknell, Barrister-at-Law.

The present theory is that the State will indemnify owners in respect of war damage to their property at the end of the war. Whether this indemnity will be complete or partial will depend on the then capacity of the country to pay. In the meantime, the mutual rights of the persons interested in leasehold property which suffers war damage are regulated by the Landlord and Tenant (War Damage) Act, 1939. This Act is founded on the Report of the Committee "on the responsibility for the repair of premises damaged by hostilities" and gives statutory force to the recommendations of that committee. The Act does not proceed on the footing that there will be any Government grant immediately available to help repair the premises. It adjusts the rights of the parties on the basis that they will be dependent on their own resources. Doubtless in the immediate future legislation will be passed enabling public grants to be made to assist in the repair, to some extent, of war-damaged premises. Such provisions will probably not affect the Act we are now considering, although the fact that financial help is made available must in many cases enable a landlord or tenant to undertake repairs which otherwise would have been beyond his unaided resources, and in this way will alter the manner in which the provisions of the Act are in fact applied.

The Landlord and Tenant (War Damage) Act, 1939, deals primarily with two separate aspects of war damage. Part I deals with the obligation to repair where property suffers war damage, whether that damage is substantial or merely trivial. Part II deals with the position which arises where land comprised in a lease suffers war damage to such an extent that the premises become unfit. Part III is devoted to ancillary matters.

We will first consider the liability to repair leasehold premises which suffer war damage. Such damage is defined as "damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by, or in repelling, enemy action": section 24.

Two principles underlie the Act in connection with the making

good of such damage. First, no provision in any disposition which imposes an obligation on any person to do repairs in relation to the land comprised in the disposition is to extend to the imposition of any liability to make good war damage to such land : section 1 (1). Where such damage has occurred, if compliance with the obligation to repair is impracticable or of no substantial advantage to the person who is entitled to the benefit of the obligation, then the obligation to repair is suspended until the war damage is made good: section 1 (2). Any express agreement to make good war damage before it has occurred is void : section 1 (2). Shortly, the effect of these provisions is that whatever agreement a landlord and tenant may make in respect of repairs or war damage, it is avoided by the Act. Before the damage has occurred it is not possible for the parties to agree as to how the burden is to be borne. In this matter the parties have no right to contract out of the Act : section 21.

Secondly, the Act does not impose any liability on any person to make good war damage. Neither the landlord nor yet the tenant can require the other to do so.

Two obligations are, however, imposed on a tenant by section 2. Where by virtue of the provisions of any lease, an obligation to repair is imposed on the tenant, the lease is to have effect as if there were contained therein covenants by the tenant with the landlord that in the event of war damage occurring to the land the tenant (a) will as soon as practicable serve a notice on the landlord stating damage has occurred and its general nature, and (b) will permit the landlord to enter upon the land for the purpose of ascertaining the extent of the damage and for the purpose of making it good. A similar obligation is placed on a mortgagor : sub-section 2.

It is to be observed that the duty imposed by section 2 only applies where the lease places on a tenant a duty to repair. Where the landlord is under a liability to do repairs there is no such liability on the tenant. It is, however, obvious that in this case also the tenant should give notice of the damage. If this is not done, the landlord may not come to hear of the damage until it has become worse through neglect.

Section 3 authorises the use of capital moneys for the repair of war damage.

So much for the position where leasehold premises suffer war damage. Neither party is under a legal obligation to repair, but the terms of the lease are not otherwise modified. The position is different where the land comprised in the lease is rendered unfit by reason of war damage. Part II deals with this matter.

"Unfit" means, in relation to buildings or works, unfit for the purpose for which those buildings or works were used immediately before the damage occurred, having regard to the class of tenant likely to occupy similar buildings or works which are not unfit, to the standard of accommodation available at the material time and to all other circumstances. In relation to other land, unfit means unfit for any purpose for which the tenant can reasonably be expected to use the land.

Where the land is unfit by reason of war damage, the Act does not avoid the lease nor yet provide for the damage being made good. What it does is to provide somewhat complicated machinery by which the parties' rights may be adjusted. The general principles underlying these provisions being that the party who is willing to do the repairs becomes master of the situation.

The future rights of the parties depend on the service of appropriate notices. The tenant may serve on the landlord a notice of disclaimer, stating that he elects to disclaim the lease; or a notice of retention, stating that he elects to retain the lease on the terms specified in the Act: section 4 (2).

Where a tenant serves a notice of disclaimer, he must within seven days of the service of the notice give notice of the disclaimer to all persons claiming immediately under him, whether as assignees, mortgagees or lessees, in respect of an interest in the land comprised in the lease. If these persons in their turn have created any interests, they must give notice of the disclaimer to persons deriving title immediately under them: section 7. In this way every person taking any interest in the lease gets notice of the disclaimer. Any person interested in the lease or the reversion thereon may, within one month from the service of the notice of disclaimer, apply to the Court to determine whether the notice is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage when the notice was served: section 6 (1).

At the expiration of one month or such longer period as may be allowed by section 5 or by an order of the Court, the disclaimer takes effect, unless the landlord has in the meantime served a notice to avoid disclaimer. The effect of the disclaimer is that: (a) the lease disclaimed is deemed to have been surrendered; (b) all sub-leases are deemed to have been surrendered, except a sub-lease by virtue whereof any person is entitled to the actual occupation of the land and in respect of which no notice of disclaimer has been served; and (c) all other interests in the leasehold premises are deemed to have been extinguished: section 8. The Court, however, has power to modify the effect of a disclaimer by

excepting from its operation any sub-lease or other interest upon such terms as the Court thinks just : section 9.

If the tenant elects to serve a notice of retention, he need not notify sub-tenants. The effect of such a notice is that there is implied in the lease a covenant by the tenant with the landlord that the land in the lease shall be rendered fit, as soon as is reasonably practicable. No rent is payable by the tenant under the lease in respect of the period beginning when the notice is served and ending with the date when the land is rendered fit. If, however, the Court is satisfied on the application of the landlord that part of the land is capable of beneficial occupation or that there has been unreasonable delay on the part of the tenant in rendering the land fit, the Court may direct the tenant to pay an apportioned rent : section 10.

Such are the rights of the tenant. Two rights are conferred on the landlord. First, if the tenant has served no notice, the landlord may serve a notice upon the tenant to elect, requiring the tenant to serve upon him within the period allowed under the Act a notice of disclaimer or of retention: section 4 (3). Unless the Court has made an order under section 6 declaring that the land is not unfit, if the tenant does not comply with the notice to elect he is deemed to have served a notice of retention : section 4 (4). If a tenant serves a notice pursuant to a notice to elect, the consequences are the same as if the notice had been served without any such pressure from the landlord.

The effect of the service of these notices by the tenant is shortly as follows : If the tenant serves a notice of retention, the landlord can do substantially nothing about it. He cannot terminate the lease, and he loses the rent while the property is being rendered fit. His only right, if the tenant is dilatory, is to apply to the Court for some rent.

The position is different where the tenant serves a notice of disclaimer. In this case the landlord may serve a notice to avoid disclaimer, requiring the tenant to retain the lease on the terms specified in the Act : section 4 (5). The short effect of a notice to avoid disclaimer is that the landlord is deemed to have entered into a covenant that the land shall be rendered fit as soon as is reasonably practicable. In the meantime no rent is payable by the tenant until it is rendered fit, unless any part is capable of beneficial occupation : section 11.

If the land suffers further war damage before it has been rendered fit after a notice of retention or a notice to avoid disclaimer has been served, the landlord or the tenant may apply to the Court for leave to withdraw the notice: section 12.

Special provisions apply to three classes of leaseholds. The first are ground leases, which are defined as leases at a rent which does not substantially exceed the rent which might reasonably have been expected to be paid for the land excluding the buildings : section 24. Notices of retention, of disclaimer or to elect cannot be served in respect of such premises. Where, however, the Court is satisfied, on the application of the tenant, that the land comprised in such a lease has suffered war damage and, having regard to all the circumstances, it is equitable to allow the tenant to disclaim, the Court may make an order that he be at liberty to serve such a notice : section 13. An application may be made to the Court to determine whether a lease is a ground lease or not : section 14.

The second class of leases to which special provisions apply are what are called " multiple leases ". A multiple lease is a lease comprising buildings which are used, or adapted for use, as two or more separate tenements. Where a tenant under a multiple lease serves a notice of disclaimer, he, the person on whom he serves it and any person interested in the term may apply to the Court to determine whether the tenant should be entitled to disclaim the lease wholly or as respects part of the premises. If the Court is satisfied that it is equitable that the lease be wholly disclaimed, it may make an order to that effect. If it is not so satisfied, but is satisfied that it is equitable to allow the lease to be disclaimed as regards one or more of the tenements comprised therein, it may make an order permitting the tenant to disclaim part of the premises, upon such terms as to apportionment of rent and other matters as the Court considers just: section 15.

Thirdly and lastly, Part II of the Act does not apply to agricultural or mining leases at all : section 17. Where the buildings or works comprised in such a lease suffer damage the tenant may apply to the Court to determine the lease or modify its terms: section 19.

Such are the main provisions of the Landlord and Tenant (War Damage) Act, 1939. It is not possible to contract out of the Act before war damage has occurred : section 21. It is open, however, to the parties to make what bargain they please after the damage has happened. In many cases it will probably be in the interests of the parties to share the burden of repairs. If the property is not rendered unfit, the Act makes no provision for such repairs. Where the property is rendered unfit these are thrown wholly on one party or the other. There will probably be many cases where a tenant is not able to bear all the cost of making the property fit, which he will have to do if he serves a notice of retention, while

at the same time he may not want to disclaim. A landlord also may not want to bear this burden, which he will have to do if he serves a notice to avoid disclaimer. In these circumstances, there is ample room for the parties mutually agreeing to share the expense as they are best able, both hoping ultimately to be indemnified by the State.

The fact that both the landlord and the tenant will not or cannot undertake the repair of the premises does not mean that such premises will be derelict of necessity until the end of the war, or until the landlord obtains the necessary funds to repair. The Housing (Emergency Powers) Act, 1939, confers power on a local authority to repair any building which is unfit for housing purposes by reason of war damage, if, owing to lack of housing accommodation, it is necessary that the buildings should be rendered fit and the owner is unwilling or unable to carry out the work. This power is exercisable with the consent of the Minister of Health. The cost is ultimately borne by the owner. Similar powers are conferred on local authorities by the Essential Buildings and Plant (Repair of War Damage) Act, 1939, in respect of buildings which are essential to the welfare of the civil population which have become wholly or partly incapable of use by reason of war damage.

These Acts together should ensure that buildings which are needed for the life of the community are duly repaired after war damage has been incurred. At the same time no individual can be forced to bear the burden of such repairs if he is unable or unwilling to do so.

THE COURTS (EMERGENCY POWERS) ACT, 1939, AND THE POSSESSION OF MORTGAGED LAND (EMERGENCY PROVISIONS) ACT, 1939, AS AFFECTING MORTGAGES.

By J. P. L. Redfern, Barrister-at-Law.

During the present emergency the rights and remedies of a mortgagee are subject to restrictions imposed by the above-mentioned Acts, which have been passed with the object of avoiding the declaration of a moratorium.

The various remedies of a mortgagee have been subjected to the control of the Court by the Courts (Emergency Powers) Act, 1939. A mortgagee who has obtained judgment for principal and interest may not, without the leave (*aa*) of the appropriate Court (*a*), proceed to execution in respect of such judgment [s. 1 (1)]. A mortgagee may not institute proceedings for foreclosure or for sale in lieu of foreclosure, or take any step in any such proceedings instituted before the commencement of this Act without the leave of the appropriate Court [s. 1 (2) (b)] (*b*), and a similar restriction applies to the appointment of a receiver by a mortgagee [s. 1 (2) (a) (ii)] (*c*); but a mortgagee may commence proceedings for the appointment by the Court of a receiver without leave [s. 1 (2), proviso (d)].

The above restrictions do not apply to a mortgagee of land or an interest in land who was in possession at the commencement of the Act (*d*), or had appointed a receiver who at the commencement of the Act was either in possession or in receipt of the rents and profits of the mortgaged property [s. 1 (2), proviso (a)]. Nor do the restrictions apply to the power of sale

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(*aa*) The discretion of the Court is exercised in with s. 1 (4): see *ante*, p. 37, and *A* v. *B*, judgment reserved (C. A.).

(*a*) *I.e.*, the Court by which the judgment has been given : Courts (Emergency Powers) Rules, 1939, Rule 2; [1939] W. N., Misc., p. 476.

(*b*) *I.e.*, the Court in which the proceedings are sought to be instituted or are pending [Rule 3].

(*c*) The appropriate Court is the High Court or the county court where neither the value of the land nor the rent payable in respect thereof exceeds £100 a year [Rule 4 (1) (b)]. Where the High Court and a county court have concurrent jurisdiction under Rule 4, application is only to be made to the High Court in special circumstances [Rule 4 (3); and see also (4)].

(*d*) The Courts (Emergency Powers) Act, 1939, came into operation on September 2, 1939 : Defence (Commencement of Enactments) Order, 1939.

of a mortgagee in possession of property other than land or an interest in land, where the power of sale has arisen and notice of the intended sale had been given before the commencement of the Act [s. 1 (2), proviso (b)].

A mortgagee may commence an action for the recovery of possession of land [s. 1 (2), proviso (d)], but without the leave of the appropriate Court (*e*) may not proceed to enforce any judgment or order of any Court (whether made before or after the commencement of the Act) for the possession of land by reason of default in the payment of the principal sum [s. 1 (3), as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, s. 2 (1)].

As the Courts (Emergency Powers) Act, 1939, is concerned with the remedies of the mortgagee, it imposed no restriction on the common law right of the mortgagee to possession, which arises on the execution of the mortgage but is not exercised unless the security is in jeopardy. To remedy this gap the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, was passed. This Act not only restricts a mortgagee from enforcing a judgment for possession as already mentioned, but also provides that a mortgagee of land may not exercise his right to possession of such land unless there has been default in the payment of the principal sum or the interest or unless the mortgagor or some person concurring in the mortgage has broken a covenant in the mortgage other than the covenant to pay the principal sum and interest [s. 1 (1)]. For the purposes of this provision a mortgagor is not deemed to have defaulted in payment of the principal sum unless he has failed to repay the principal sum within three months of the receipt of a written demand for the payment thereof [s. 1 (2)]. Mortgages where the mortgage money is payable by instalments are expressly exempted from this provision [s. 1 (3)].

The above provision does not apply to a mortgagee in possession before the passing of the Act (*f*), but it does apply to proceedings commenced before or after the passing of the Act. Where an order for possession of land has been obtained before the passing of the Act, unless the contrary appears there is deemed to have been a default in payment of the principal sum and the order is deemed to have been made by reason of such default. But the Court which made the order has power to vary or rescind such order in such manner as appears just in view of the provisions of section 1 of the Act [s. 1 (3)].

(*e*) *I.e.*, the Court which made the judgment or order or in which the same is being sought.

(*f*) September 21, 1939.

EXECUTION OF TRUSTS (EMERGENCY PROVISIONS) ACT, 1939.

By J. P. L. Redfern, Barrister-at-Law.

The purpose of this Act is to facilitate the execution of trusts during the present emergency (*a*) by enabling a trustee, personal representative, tenant for life or statutory owner (*b*) to delegate to any person or to two or more persons jointly the exercise of any functions (*c*) vested in him as such for the period during which he is engaged in war service (*d*) and one month thereafter [section 1 (1)].

A personal representative, in addition to delegating to another the administration of an estate, may delegate to such person the functions which devolve on him owing to his becoming a trustee after the completion of administration [section 1 (2)].

The functions may not be delegated to any person who has not the capacity to act as a principal [section 1 (3) (a)] and no delegation is permitted in the case of an implied or constructive trust [section 1 (3) (b)]. One of two trustees (*e*) may only delegate his functions to his co-trustee if such trustee is a trust corporation [section 1 (3) (c)]. Where there are more than two trustees a trustee may not delegate his functions to a co-trustee (not being a trust corporation) (*f*) if one or all of the other trustees have previously delegated their functions, whether under this Act or otherwise (*g*), to that co-trustee [section 1 (3) (d)].

(*a*) The period beginning on September 1, 1939, and ending with the date on which the emergency is declared by Order in Council to have come to an end: s. 7.

(*b*) These expressions and the expression "trust corporation" have the same meaning as in the Settled Land Act, 1925: s. 7.

(*c*) The expression "functions" includes discretions, powers and duties: s. 7.

(*d*) S. 7: "War service" means—

(a) service during the period of the present emergency (whether within or outside the United Kingdom) in any of His Majesty's naval, military or air forces or the nursing service or other auxiliary service of any of those forces;

(b) any other service during that period (whether within or outside the United Kingdom) in any British ship;

(c) any other work or employment during that period outside the United Kingdom in connection with the present war.

(*e*) In s. 1 (3) references to a trustee include references to a personal representative.

(*f*) The Execution of Trusts (War Facilities) Acts, 1914 and 1915, did not enable one of several trustees to delegate the execution of the trust to a co-trustee: *Re Wells and Hopkinson's Contract*, [1916] 2 Ch. 289.

(*g*) *I.e.*, under Trustee Act, 1925, s. 25.

A power of attorney is the method prescribed for the delegation of a trustee's function under section 1 of the Act. Section 129 of the Supreme Court of Judicature (Consolidation) Act, 1925, which permits the filing of instruments creating powers of attorney in the Central Office of the Supreme Court, and section 125 of the Law of Property Act, 1925, which directs the filing of powers of attorney relating to land at the Central Office or, in the case of registered land, at the Land Registry [section 1 (4)]. Therefore if a trustee gives a power of attorney under this Act it need only be filed if it relates to land, but if he gives a power of attorney under the Trustee Act, 1925, such power must be filed whether it relates to land or not (*h*).

The power of delegation contained in section 1 of this Act is in addition to that conferred on a trustee, personal representatives, tenant for life, or statutory owner (*i*) by section 25 of the Trustee Act, 1925, which permits a trustee, who intends to remain out of the United Kingdom for more than one month, to delegate the execution of a trust during his absence abroad.

The donor of a power of attorney under this Act is not liable for any act or default of the donee provided that the latter was appointed in good faith and without negligence [section 2 (1)]. Therefore a trustee should wherever possible appoint an attorney under this Act and not under section 25 of the Trustee Act, 1925, as in the latter case he is liable for the acts and defaults of the donee as if they were his own acts and defaults (*k*). In relation to the donee of the power the Court has the same jurisdiction and power as if he were the principal [section 2 (2)].

The Act provides that the power of attorney must be attested by one witness and may be made before or after the commencement of the period during which the donor is engaged in war service [section 3 (1)]. A similar provision is contained in section 25 (4) of the Trustee Act, 1925, but that Act provides that a statutory declaration must be made (*l*) by the donor that he intends to remain out of the United Kingdom for more than one month. In the case of a power of attorney given under this Act no such declaration is necessary and, as already mentioned, the power need not be filed unless it relates to land.

Persons dealing with the donee of the power are protected in the event of the power having been revoked by the donor or by operation of law unless they have actual notice of the revocation

(*h*) Trustee Act, 1925, s. 25 (4) and (6) (registered land).
(*i*) See Trustee Act, 1925, s. 25 (11) and s. 68 (17).
(*k*) Trustee Act, 1925, s. 25 (2).
(*l*) See Form 19 on p. 472, *post*.

of the power [section 3 (2)] (*m*). In this connection it should be noted that a report that a person is missing or is missing and is believed to have been killed does not amount to actual notice of the death of that person, unless his death has been presumed by order of a Court of competent jurisdiction, and no person is deemed to have actual notice of the death of that person unless he has notice of such order [section 6].

The Act provides that a statutory declaration by the donee of a power of attorney relating to any trust or estate that the donor of the power is or was at a specified date, engaged in war service (*n*), or that in any transaction the donee is acting in the execution of the trust or the administration of the estate is, in favour of a person dealing with the donee of the power, conclusive evidence of that fact [section 3 (3)]. This provision is similar to that contained in section 25 (7) of the Trustee Act, 1925.

The general rule that a donee of a power of attorney may not appoint an attorney to act for him is preserved, though an exception is made in the case of the transfer of any inscribed stock [section 4 (1)]. It is also provided, following section 25 (10) of the Trustee Act, 1925, that the power of attorney is not to constitute notice of the trust to any person in whose books the stock is inscribed [section 4 (2)] (*o*).

If an infant dies while engaged in war service or while he is outside the United Kingdom and immediately before his death owing to the present war was prevented from returning, any act done or instrument executed under the powers contained in section 26 of the Settled Land Act, 1925, is valid and effectual in favour of any person who, when the act was done or the instrument executed, did not have actual notice of the death of the infant [section 5].

(*m*) A similar provision is contained in s. 25 (8) of the Trustee Act, 1925.

(*n*) Includes period during which a person is outside the United Kingdom and owing to the present war is prevented from returning to the United Kingdom: s. 3 (4).

(*o*) "Stock" includes shares and any fund, annuity or security transferable in books kept by any person or by any instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein.

LIABILITY FOR WAR DAMAGE (MISCELLANEOUS PROVISIONS) ACT, 1939.

By P. H. Thorold Rogers, Barrister-at-Law.

This Act came into force on September 3, 1939 (section 8 (iii)). It is much less pretentious than the Landlord and Tenant (War Damage) Act. As its name implies, it is concerned to deal with the incidence of liability for the loss or damage of chattel property by war. Its basic principle may be summed up as being to let the loss lie where it falls, notwithstanding contractual stipulations to the contrary. But it has not been thought necessary to prohibit contracting parties from making their own agreements and thus, except in contracts of little value where commercial oppression is feared, it is possible by contracting with special reference to war damage to avoid the provisions of the Act.

The definition of "loss by war" and "damage by war" is given in section 8 (2): they mean respectively "loss (including destruction) and damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by or in repelling enemy action". There is no reference as in some of the other Acts to damage caused whilst repelling an *imagined* attack. The history of the first few days of the war shows that this omission may be important.

Of the first four sections out of the total eight (*a*), section 1 deals with bailments, including hire-purchase agreements; section 2 with goods sent on approval and on sale or return; section 3 with the liability of innkeepers; and section 4 with that of pawnbrokers under the Pawnbrokers Act, 1872 (section 27), for damage by fire to pledges on which a loan of less than £10 was made (*b*).

Bailment (section 1).

The Act protects both bailor and bailee so far as war damage is concerned against any liability imposed on the bailor or bailee

(*a*) S. 5 releases customs and excise duties on goods destroyed or damaged before they have been taken out of bond. Ss. 6 and 7 apply the Act to Scotland and Northern Ireland respectively. S. 8 is the definition section.

(*b*) Where the loan was greater the Pawnbrokers Act does not apply and there is no liability apart from negligence. The effect of s. 4 is to except fire damage caused by war from the provisions of s. 27.

" by the provisions (whether express or implied) of any contract or by any enactment, rule of law or custom—

(a) to insure against loss or damage to the goods;
(b) to repair damage to the goods;
(c) to replace the goods in the event of loss;
(d) to restore the goods or deliver them up in good repair notwithstanding such loss or damage;
(e) to continue to pay for the hire of the goods, notwithstanding such loss or damage; or
(f) to pay damage or compensation for any loss of or damage to the goods."

The protection only applies to such obligations when they are imposed by a contract in general terms; contracts specifically referring to war damage are unaffected: section 1 (iii) (*c*).

As a bailee will lose the protection of the Act if he keeps or transports the goods otherwise than in accordance with the contract (section 1 (ii)), many hire-purchasers of goods who have moved them without permission from the place where they contracted to keep them, and perhaps also carriers and warehousemen, will find themselves saddled with liability for war damage. This is the result of section 1 (1).

There is no definition of " bailment " in the Act. It of course includes the ordinary transactions of carriers, wharfingers and warehousemen; but it also embraces hirers and hire-purchasers (section 1 (3)). Purchasers under the many different types of " credit-sale " or " deferred payment " agreements do not come within the Act. It is thought to be clear that such contracts do not constitute a bailment: for in *South Australian Insurance Co., Ltd.* v. *Randell* (1869), L. R. 3 P. C. 101, it was laid down that there is no bailment where goods are delivered under a contract in return for money or money's worth. These agreements are now so common that it is felt to be a matter of regret that the neglect to deal properly with them in the Hire-Purchase Act, 1938, has been followed by an even more complete neglect in the emergency legislation. They are not even covered by section 2, which relieves persons of any obligation to pay for goods which have been lost or damaged by war before the property in them has passed, for section 2 (a) confines its operation to goods sent on " approval or on sale or return or other similar terms ".

Hire-purchasers will, however, obtain much relief from the Act provided that the dealers do not vary their contracts by inserting special " war liability clauses ", which, unfortunately, they are

(*c*) But see special case of hiring and hire-purchase agreements below.

free to do except where the contract is within the Hire-Purchase Act, 1938 (*d*).

To a small extent dealers may also benefit, but only in those cases in which they have been in the habit of assuming liabilities to insure or repair. There are some credit-sale companies who covenant to maintain the goods sold in repair; they will be wise to vary their agreements by excepting war damage as soon as possible.

Sub-section 2 of section 1 deprives bailees of the protection of the Act if the goods are lost or damaged whilst being kept or transported in a manner which contravenes the contract. This will apply only so long as the bailee continues to break the contract and he may avoid it by showing that he thought the goods would be safer. Apparently general safety is here meant and not merely immunity from risk of war loss or damage.

Owing to the wording of section 1 (2) it is thought that even if the bailee does break his contract in the manner mentioned he will still be relieved from any liability to insure against war damage or to continue to pay hire; for the subsection says that nothing in section 1 shall relieve a bailee from any "liability for loss or damage" by war which occurs whilst he is breaking his contract in the manner specified, and neither a liability to insure nor one to pay hire is a liability for loss or damage.

Another very curious point arises on section 1 (1); it declares that a liability to continue to pay hire if the goods are lost or damaged shall not extend to loss or damage by war. The result seems to be truly remarkable: there is no provision for adjusting the hire in the case of partial damage and the hirer therefore is relieved of all further instalments if the goods suffer *any* war damage!

Section 3, which deals with innkeepers, seems to be unnecessary. At common law an innkeeper was never liable if he could prove that a loss was due to the king's enemies or that damage (as distinct from loss) was caused without his negligence: *Winkworth* v. *Raven*, [1931] 1 K. B. 659. The only effect of the Act is slightly to enlarge the idea of the king's enemy and possibly, though this is doubtful, to relieve the innkeeper from liability for damage caused by war even though he has contributed to this by his negligence.

Sale or return.

At common law *res perit domino*; loss falls where the property in the goods lies. Many persons contract out of this when sending

(*d*) *E.g.*, is for less than £100, or £50 in the case of a motor vehicle or railway rolling stock and £500 in the case of livestock.

goods on approval, or on sale or return. Section 2 exempts loss or damage by war from any such general contract—the loss must fall upon the vendor—except where the parties have specifically referred to it. The section follows the Sale of Goods Act, 1893, in referring to goods sent " on approval, or sale or return or other similar terms ". In *Weiner v. Gill*, [1906] 2 K. B. 574, the Court of Appeal held that goods sent " on sale for cash only or return " were not within these words. Insurance problems arising out of a policy on goods sent abroad on approval shortly before the last war were discussed in *Moore* v. *Evans*, [1918] A. C. 185, but the decision turned eventually on the meaning of " loss ".

THE COMPENSATION (DEFENCE) ACT, 1939.

By P. H. Thorold Rogers, Barrister-at-Law.

The assessment of compensation for the compulsory acquisition of land by public and private authorities has been the subject of much legislation and many decisions in the past. So far as statutory and public authorities are concerned the relevant statutes are the Clauses Acts as amended in the respective circumstances, and the Acquisition of Land (Compensation) Act, 1919.

Seizure of land by the Crown in times of emergency has also had a long history. "Speaking generally", said Lord Dunedin, in *Att.-Gen.* v. *de Keyser's Royal Hotel*, [1920] A. C. 508, "what can be gathered from the records as a matter of practice seems to resolve itself into this. There is a universal practice of payment resting on bargain before 1708 and on statutory power and provision after 1708."

Most of these earlier statutes were purely temporary, and they were usually passed at a time of emergency. The first Act to frame as it were a code was the Defence Act, 1842, which, as a result of later amendments should now be referred to as the Defence Acts, 1842–75. This Act, after providing for the acquisition by agreement of land, sets out in section 19 the procedure to be followed where agreement is impossible and conferred upon the subject a right to compensation for the "absolute purchase . . . or for the possession or use" of land. The complicated procedure there prescribed for seizing land has been swept away, the authorities have been given the right to use all the powers and provisions of the Lands Clauses Acts (section 7 Lands Clauses Act, 1860) and a new method of assessing compensation has been substituted for the clumsy one of a jury. All these changes except the second have been effected by the Acquisition of Land (Compensation) Act, 1919, which was passed after the last war as a result of the Report of the Ministry of Reconstruction (1918, Cd. 9229); but this Act deals only with the assessment of compensation for the *acquisition* of *land*.

Both of the words in italics are important; in the first place the Defence Acts dealt not only with acquisition but also with the temporary occupation of land; in the second place it dealt only with land. So far as the *acquisition* of land is now concerned the procedure of the 1919 Act must be followed; but compensation for the occupation of land was left untouched and none of these Acts ever professed to deal with the requisitioning of chattels.

The Compensation (Defence) Act, 1939 has set out to provide

a comprehensive code for the assessment of compensation in cases in which the 1919 Act does not apply. It bears all the marks of having been prepared in a great hurry and insufficient attention has been paid both to the principles of earlier legislation and also to the recommendations of the Report referred to above.

The arguments put forward by the Crown during the last war in the *De Keyser Case* are now forestalled by section 15. It was then contended that the Crown retained a discretionary prerogative power to requisition property at common law without payment of compensation. The House of Lords doubted if any such power ever existed, but were certain that it was suspended by the Defence Act, 1841. Section 15 of the modern Act specifically enacts that in all cases (except those where an express contract is made) in which property is requisitioned under the Emergency Powers Defence Act, 1939, the Telegraph Act, 1863 (s. 52), the Air Navigation Act, 1920 (s. 7), or "any power exercisable by virtue of the prerogative of the Crown", the compensation shall only be assessed under this Act.

The scheme of the Act is this: Section 1 creates the right to compensation. It is to exist wherever possession of land, or property other than land, including space on board ship or aircraft (but not it would seem on any motor or horse vehicle) is requisitioned (*a*), or where the annual value of land is diminished as a result of work done on that land (*b*).

Sections 2 to 6 inclusive deal with the method by which the compensation is to be assessed—this method varying according to the type of property in question; whilst sections 7 to 9 constitute tribunals for determining disputes, and the remainder (sections 10 to 20) deal with definitions and "sundries".

Compensation under the Act in respect of land is payable both for a complete dispossession (section 2) and also for the execution on the land of any work of the kind described below.

For the actual loss of possession where land has been taken the compensation accrues due from day to day (though payment can only be required at intervals of three months: section 2 (2)) to the person "who for the time being would be entitled to occupy the land" but for the requisition.

The sum payable for actual loss of possession is to be the equivalent of the rent which could be obtained from a tenant who undertook the usual liabilities (rates, repairs, insurance, etc.)

(*a*) Power to requisition space in ships and aircraft is conferred by the Defence Regulations, r. 54. There is no similar power in respect of vehicles.

(*b*) No compensation under the Act is payable for work done on land to avoid the spreading of the consequences of damage caused by war operations: s. 1 (1) (c); the last phrase is defined as "action taken by an enemy, or action taken in combatting an enemy or in repelling an imagined attack by an enemy".

under a lease granted immediately before possession of the land was taken.

The difficulties arising out of this method of assessment and the probable injustices are legion. It is thought that since the definition of the hypothetical rent follows so closely that given in the Rating and Valuation Act, 1925, the same principles will to some extent be applied; but it is submitted that it would also be right to bear in mind the principles which have been elaborated in connection with the Clauses Acts. In connection with these it has been held on many occasions that it is the value to the owner that is material and not that to the compulsory purchaser, and also that the possibilities of the land must be taken into account even though no advantage was being (or even was intended to be) taken of them at the time. (See these principles discussed by Eve, J., in *S. E. Ry.* v. *L. C. C.*, [1915] 2 Ch. 252, at 258.)

The first of the difficulties arises out of the fact that whereas the hypothetical tenancy for rating purposes is a yearly tenancy with a reasonable expectation of renewal (*per* Cockburn, J., in *G. E. Ry.* v. *Haughly* (1866), L. R. 1 Q. B. 666) no period is given in the Compensation (Defence) Act. If, as is believed to be the case, it is the practice of the authorities when requisitioning land not to state a definite period for the requisition, the assessment of the hypothetical rent will be well nigh impossible. The rent obtainable for a hotel with a seasonable trade will vary enormously according as to whether it is payable for a portion or for the whole of a year, or for that matter for one or more years. Since the occupation of the Crown will probably continue throughout the emergency, and, if the analogy of the last war holds good, for some time thereafter, it is impossible to foretell its duration. It would appear that the draughtsman when drawing this section assumed that the compensation would not fall to be assessed until the possession was returned to the owner, in which case the duration of the hypothetical tenancy would have become apparent. But the Act is not capable of any such construction, for claims for compensation must be presented within six months (unless the Treasury extend the time) of the day on which the compensation accrued due and compensation in the case of the hypothetical rent accrues due from day to day: section 2 (2).

The second difficulty is one which should never have arisen. In *Cripps on Compensation*, p. 114, it is said: "There are some cases in which the income derived, or probably to be derived, from land would not constitute a fair basis in assessing the value to the owner"; and the learned author instances as examples of such property "churches, schools, hospitals and houses of an excep-

tional character". The principles of this were accepted by the Ministry of Reconstruction Report already referred to, and as a result there was inserted into the Acquisition of Land (Compensation) Act, 1919, s. 2, Rule 6, which runs: "The provisions of rule 2 shall not affect the compensation for disturbance or any other matter not directly based on the value of the land".

The occupier whose land is seized by the authorities under the Defence Regulations and who looks to the Compensation Defence Act for his compensation cannot hope to obtain more than a fraction of his loss under the heads of goodwill and disturbance. In so far as goodwill attaches to land so as to benefit an incoming tenant it does of course form a matter to be taken into account in fixing the hypothetical rent; but it is only a very small proportion of most goodwills which will so attach.

Fixtures which are attached to the freehold are included in assessing compensation under the Lands Clauses Act (*Gibson* v. *Hammersmith Ry.* (1863), 32 L. J. Ch. 337), and it is submitted that their presence must be taken into account in assessing the hypothetical rent under the Act, except where directions are given by the competent authority to remove them, in which case the costs of removal (and possibly of storage) will be claimable: section 2 (1) (d). This may work great hardship to a tenant whose land, together with trade fixtures which he might have removed at the end of the lease, is requisitioned shortly before the lease expires; for the tenant will lose his fixtures and the landlord will (as from the termination of the lease) be entitled to the whole of the enhanced compensation. The tenant will not be protected by section 14 for his right is not in the nature of a mortgage, pledge or lien. Equally severe hardship may occur when the removal of the fixtures is directed, for it is thought that the hypothetical rent will then be calculated without reference to them (though this is by no means certain as the Act does not make it clear at precisely what moment it is to be calculated). The incidental costs of complying with the directions will be recoverable (section 2 (1) (d)), but no allowance is made in the Act for the loss of the use of such fixtures, even though, as is often the case, the claimant is in the course of purchasing them under a hire purchase agreement. Nor again is any allowance made for the fact that occupiers of business premises frequently raise money on the security (by mortgage, debenture, or charge) of the property and the fixtures; such an occupier will lose the use of his fixtures and his opportunity of earning profits thereby, but will continue liable for his interest payments.

A very limited compensation for disturbance is given to agricultural tenants only by section 2.

A third cause of possible hardship and difficulty is that the Act makes no provision for compensation for injurious affection or severance, nor, on the other hand, does it allow the Claims Tribunal to apply the principles of betterment which have been so often inserted in recent legislation of this sort. No claim can, it is thought, be made under the Act for compensation for injurious affection to land held where other land is taken from the same owner, although it had been decided in *Blundell* v. *R.*, [1904] 74 L. J. K. B. 91, that a claim under this head might be made under the Defence Act, 1842–75.

Yet further difficulties are likely to arise as a result of the dichotomy of land and property other than land which is adopted in section 1; for the later sections of the Act only give a right to compensation in respect of the requisitioning of goods, and ships or aircraft. Land is defined in section 17 as including "land covered with water and parts of houses and buildings". The definition from the Interpretation Act, 1889, is also invoked so that the word includes "messuages, tenements and hereditaments, houses and buildings of any tenure". In connection with the Lands Clauses Acts it has been decided that "the words 'of any tenure' do not limit the application of the definition of hereditaments to such incorporeal hereditaments as are capable of tenure, but are to be read as meaning 'of whatever tenure, if any', and lands as there defined, include easements" (*Great Western Ry.* v. *Swindon, etc., Ry.* (1884), 9 App. Cas. 787). If, then, a servient tenement is seised it would seem that the owner of the dominant tenement is entitled to put in a claim for compensation in calculating which a hypothetical lease of his interest for an uncertain period will have to be visualised. Rights less than an interest in land such as an agreement for the use of a bar in a theatre (*Frank Warr & Co.* v. *L.C.C.*, [1904] 1 K. B. 713) or a parol licence to shoot (*Bride* v. *Great Eastern Ry.* (1865), 34 L. J. C. P. 366) have never been entitled to compensation.

For damage done to the land (other than fair wear and tear) compensation is payable amounting to the cost of making it good; with an exception where this would exceed the value of the land *at the time it was seized*, in which case the value only will be paid. If there is any serious inflation or devaluation of currency the results on this section will be disastrous; for the compensation will not be calculated until the land is surrendered and the measure of the compensation will be the cost *then* of making the damage good, not the cost at the time it was done. This compensation is payable to the owner (section 2 (3)) at the time when the property is surrendered and it will not accrue due till then. "Owner" is

defined in section 17 as the person who receives or would receive, if the property were let, the rack rent.

In the case of agricultural land (*c*) compensation is payable for the loss of growing crops, etc., to the tenant in possession at the time of the seizure on the same lines as would be paid by an incoming tenant (section 2 (1) (c)). And in all cases compensation is payable to any person who incurs expense, at the direction of the Government, in connection with the seizure of the land (section 2 (1) (d)).

For work done on land the compensation is an annual sum, payable quarterly in arrear, equal to the diminution in the annual value of the land (section 3). Depreciation in value due to loss of pleasure or amenity is disregarded (section 3 (7)). The authorities have power to serve a notice determining the above compensation and to pay instead a lump sum equal to the diminution in value of any estate or interest then held in the land (section 3 (3)). This amount will of course usually be less than the cost of restoring the land, but it should be noted that any person with an estate or interest in the property may apply; landlord and tenant, life tenant and remainderman, mortgagee or rentcharge owner, all have a right to apply.

The requisitioning of vessels, vehicles and aircraft is dealt with separately in section 4. Compensation is payable to the "owner" (section 4 (2)) (except for special expenses, but are reimbursed to whoever incurred them: section 4 (4)), that is, in the case of personalty, the person entitled to sell the property, but if there is a subsisting contract of hire under which some person would be entitled to the property the owner will hold the compensation on trust for him.

The compensation payable for such a requisition will be the aggregate of (1) a fair hire rent for the period of the requisition, disregarding any rise in value due to the emergency; (2) any reasonable expense incurred in running the machine in question (payable to whoever incurred it: section 4 (1) (b)); (3) the cost of any repairs (payable to the owner at the time when the requisition ceases); (4) the value of the machine where it is a total loss; and (5) expenses incurred in giving effect to the requisition (*e.g.*, altering or delivering the machine). Payment of compensation for a total loss will give the Crown the same rights as those of an insurer; the Crown will be subrogated to the owner's rights against

(*c*) "Agricultural land" means any land used as arable, meadow or pasture land, land used for a plantation or a wood or for the growth of saleable underwood, or land used for the purpose of poultry farming, market gardens, nursery grounds, orchards or allotments, including allotment gardens within the meaning of the Allotments Act, 1922.

third persons and will be entitled to take over the machine. At any time during the period of a requisition the authorities may serve a notice of *acquisition* the effect of which is to purchase the machine outright (section 4 (8)). Compensation is then payable to the owner, the measure being the *then* value of the machine less any appreciation due to the emergency (section 4 (7)).

The calculation of compensation where space in a ship or aircraft is requisitioned is dealt with on similar lines by section 5.

This leaves as yet untouched the compensation to be paid for the requisition of goods. During the last war the Defence Regulations not only created the power to seize but also purported to vary the statutory obligation to pay a fair price (Army Act, 1881, s. 4) and, in doing so, to deprive the owner of the full market price. In *Newcastle Breweries* v. *R.*, 36 T. L. R. 276, it was held that any regulation which did not entitle the owner to the market value was *ultra vires* because it could not be necessary to the defence of the Realm.

The Act gives a right to compensation in such cases by section 6, but it has to some extent legalised the alleged injustice in the *Newcastle Case* (*supra*) and the price to be paid is calculated without regard to any appreciation in the value of the goods due to the emergency. It may be right to deprive an owner of an unearned profit, but it is at least arguable that this section (section 6 (1)) applies equally to the man who has only just bought the article at its enhanced price!

This will be paid to the owner (as defined in section 17) and will vary according to whether he is or is not a trader. The compensation payable to the ordinary man who buys an article for use will normally be the price at which he could have sold it immediately before the requisition (disregarding any rise in price due to the emergency). Any *profit* he might have made is always to be disregarded. Special rules (section 6 (2)) limit the compensation to be paid to manufacturers and merchants—persons, that is, who produced or bought goods with a view to resale. In their case the measure is to be the cost respectively of producing or of buying the goods, plus such profit as might have been earned by a sale immediately before the requisition. This overlooks the fact that many manufacturers make, and even more merchants and traders buy, goods out of season to hold in stock, hoping to recoup themselves the expenses of storage, insurance, etc., by a sale in season when the prices rise. Under the Act this looked-for profit will be disregarded and the claimant confined to the "profit" he could have made by selling at once—possibly in a slump, for, though a rise in prices due to the emergency is disregarded, the Government

is free to take full advantage of any fall in value attributable to the same cause.

There are special provisions to deal with prices fixed by law (section 6 (2)), and incidental expenses (section 6 (3)).

Hire-purchase transactions receive special attention, but, as in the Liability for War Damage Act, 1939, insufficient thought has been given to the effect of the Act on the different types of credit-sale agreements. Section 13 enacts that whenever compensation is payable under the Act to the owner of any property and that property is "then in the possession of some other person by virtue of a hire-purchase agreement" that person may make a claim to have the compensation apportioned. And section 14 protects the rights of mortgagees, pledgees and the holders of liens or other similar obligations by providing that the money so paid shall be deemed to be comprised in the mortgage, pledge or lien—a provision which will be difficult to apply to a possessory lien.

It is hardly within the scope of this article to discuss the composition and powers of the Claims Tribunals (sections 7 and 8); it will suffice to remark that there is a comprehensive power to state a case for the High Court (section 7).

THE ESSENTIAL BUILDINGS AND PLANT (REPAIR OF WAR DAMAGE) ACT, 1939.

This Act provides machinery for the repair of buildings used for purposes essential to the welfare of the civil population, and for the reinstatement of the plant of undertakings carried on for such purposes, where the buildings or plant are damaged by war. The most important section of the Act is section 1, which is very long and complicated and contains six sub-sections, and no less than eighteen sub-paragraphs and three provisos. The effect may be summarised as follows:—

(1) *Buildings covered by the Act* (section 1 (1)).

The buildings (which includes land used with a building) covered are those (other than buildings used solely for housing purposes) used for purposes which in the opinion of the appropriate Minister (*a*) are essential to the welfare of the civil population. Such buildings must have become wholly or partly incapable of use for those purposes by reason of war damage (*b*); be

(*a*) Defined in s. 4 (1) as the Secretary of State or other Minister in charge of the Government Department concerned with the purposes for which the building is used or the undertaking is carried on.

(*b*) Defined in terms similar to those in the Housing (Emergency Powers) Act: see note (*a*), *post*, p. 64.

capable of being rendered fit for the purposes at reasonable cost, and there must be such a lack of buildings for those purposes as to make the rebuilding essential. A local authority may make representations to the Minister with respect to any buildings in its area which come within this definition.

(2) *Procedure.*

Loans may be made as follows:—

(a) Where a local authority is the owner or occupier (section 1 (2)).

The appropriate Minister may loan the money necessary to carry out the works, on the application of the authority, or the Minister may himself require the carrying out of the works and loan the money.

(b) Where the building is in private ownership or occupation (section 1 (3)).

An owner does not include a mortgagee not in possession, but does include any person entitled to the rents and profits under a lease for an unexpired term exceeding three years.

A loan may be granted either by the appropriate Minister or by the housing authority in whose area the building is situated to the person in ownership or occupation of the building, provided that the Minister or authority is satisfied that the person is willing, but unable without financial assistance, to carry out the necessary works. The loan may be made on such terms as the appropriate Minister may fix (section 3 (1)). Any local authority or other person shall be deemed to have the power to borrow the amount of the loan for the purposes for which it is made (*ibid.*).

(c) Buildings used as hospitals or first-aid posts or otherwise for civil defence purposes, or as schools or other educational establishments (section 1 (4) and (5)) (*c*).

Where the owner or occupier is willing for works to be carried out but unable to carry them out without financial assistance, the Minister may require the local housing authority to carry out the work or to loan the necessary money. The provisions of section 10 (3), (4), (5), and (6) of the Housing Act, 1936, relating to the recovery of expenses apply, except that no demand under section 10 (3) may be made until the end of the war.

(d) Security for loans under section 1 (section 3 (3)).

Any loan made to a person not being a local authority is a charge on the premises in respect of which the loan is made, and

(*c*) Power is given to a Minister to bring other classes of building within the scope of these provisions: s. 1 (5) (c).

the Minister or local authority has all the powers and remedies of a mortgagee by deed for the purpose of enforcing the charge. There are no rules for registration of the charge, so presumably it is treated as a legal mortgage without registration.

(3) *Repair of essential plant, etc.* (section 2).

Section 2 provides for the repair of plant employed in an undertaking wholly or partly for purposes essential to the welfare of the civil population. The undertaking must have become wholly or partly incapable of being carried on for those purposes by reason of war damage. In these circumstances loans can be made to a person who is willing but unable without assistance to repair the plant. The capacity of a local authority does not in this case arise, as obviously such undertakings would fall within the public utility class and powers, duties and authorities for carrying them on are supplied by other legislation. It will be observed that the general principles are analogous to those in the case of land and buildings, but in the nature of things the form of security is different and varies as the undertaking is carried on by a company or a private person or persons.

(a) Loans to companies.

The loan will be secured by a floating charge over all the assets of the company in the form of a debenture (section 3 (4)). The charge will become fixed on the event specified in the charge and the Minister will have the remedies mentioned in the instrument. It is to be treated as a duly registered debenture and section 79 of the Companies Act, 1929, requiring registration within twenty-one days does not apply, except that priority will be given to a debenture registered after twenty-one days and before registration of the charge (section 3 (4) (b)). The charge will take priority over all charges of whatever date affecting the property mentioned in the charge (section 3 (6)), except in the case of the unregistered debenture mentioned above.

(b) Loans to persons and bodies corporate not companies.

The Act here introduces an innovation, because it provides for a floating charge in the form of a debenture over all the assets for the time being of the undertaking. This will crystallise as a debenture crystallises on the happening of an event. This form of security is not known to the law of partnership in any definite form as here. Presumably the assets of the undertaking include any land held by the owners of the undertaking for the purpose of the undertaking. Rules are to be made for registration by the Chief Land Registrar, applying with any necessary modification the rules for the registration of land charges. The charge has

priority over all charges of whatever date affecting the property charged.

These provisions certainly add a new terror to transactions with land and to business creditors should war damage really become a feature of this war. However, in order that searches may become material it will be necessary (i) for war damage to occur, and (ii) for the undertaking to be employed in essential purposes. *Experientia docet!*

THE NAVY AND MARINES (WILLS) ACT, 1939.

This is a short Act, enabling the Admiralty to exempt certain wills from the operation of section 5 of the Navy and Marines (Wills) Act, 1865, which prescribes the form in which wills of sailors and marines must be made in order to be valid for the disposal of naval assets. "Naval assets" are defined by section 1 (2) as any wages, prize money, bounty money, grant or other allowances in the nature thereof, or other money payable to the seaman or marine by the Admiralty, or any effects or money belonging to him and in charge of the Admiralty. The effect of the new Act is to revive the operation of section 7 of the Act of 1865 (which was repealed by the Navy and Marines (Wills) Act, 1930, s. 1 (1) (d)), for the duration of the present war. Any instrument or statement executed or made before the end of the war by a serving seaman or marine and intended to operate as a testamentary disposition of naval assets, whether alone or with other property, may be exempted by the Admiralty from the formalities laid down in section 5 of the 1865 Act.

THE HOUSING (EMERGENCY POWERS) ACT, 1939.

Time does not permit of an extended consideration of this Act, which will be dealt with in detail later, but for the convenience of subscribers a short outline of its provisions follows.

The Act gives powers to local authorities to execute repairs to any building, whether a house or not, which has been rendered in any respects unfit for housing purposes by reason of war damage (*a*), if the authority is satisfied (i) that the building is capable at reasonable expense of being rendered fit for such purposes; (ii) that it is necessary to render it so fit owing to lack of housing accommodation in the area; and (iii) that the person in

(*a*) War damage means (s. 6 (2) (a)) damage caused by enemy action or in repelling enemy action or by measures taken to mitigate the consequences of damage so caused.

control of the building is unable or unwilling to carry out the necessary works (section 1 (a), (b), (c) and (d)).

The consent of the Minister of Health is required, and at least fourteen days' notice must be given to the person in control. At the expiration of the notice the authority may, after considering any representation made by the person in control of the building, enter and execute the works specified in the notice and such other works as may be agreed upon between the authority and the person in control (section 1 (1) and (2)).

There is an important proviso to section 1, which empowers an authority to execute temporary repairs at any time where necessary to avoid danger to health, without the consent of the Minister and without serving notice.

The provisions of Part II of the Housing Act, 1936 (*i.e.*, sections 2 to 24) are applied to the above section, with certain modifications (section 2 (1)). Thus the definition of the person "in control" in section 9 (4) of the 1936 Act is adopted, as are the provisions of section 19 relating to the protection of the interests of owners (section 2 (2)). Similarly, the provisions of section 10 (3), (4), (5) and (6) relating to the recovery of expenses apply, except that no demand under section 10 (3) may be made until the end of the war (section 2 (3)). The provisions of section 15 (1) (a) relating to appeals against notices requiring the execution of works are, however, excluded (section 2 (4)).

THE DEFENCE REGULATIONS, 1939.

In addition to the Statutes dealt with in earlier articles, mention should also be made of the powers given to the Crown by the Defence Regulations (S. R. & O., 1939, No. 927) (*a*) made under the Emergency Powers (Defence) Act, 1939. It is proposed to outline as shortly as possible, consistent with accuracy, such of these as affect land and property.

(1) General Powers Affecting Land.

(a) *To do Work* (*Regulation 50*).

There is a general power, under paragraph (1), given to any member of H.M. Forces in the course of his duty, or any person authorised by a competent authority (*b*), to do any work on or

(*a*) Published with amendments to September 21, 1939, by H.M. Stationery Office. Price 2s.

(*b*) "A competent authority" in this connection, and elsewhere unless specifically provided, is defined by Reg. 49 as: A Secretary of State, the Admiralty, the Board of Trade (which may delegate powers to the Secretary for Mines) the Ministers of Agriculture and Fisheries, of Health, of Transport, and

place anything in, on or over, any land. The "doing of work" is defined by paragraph (4) as including the demolition, pulling down, destruction or rendering useless of anything placed in, on or over the land, the maintenance of any work or thing in, on or over the land, and the removal from the land of anything placed, demolished or pulled down under the regulation.

A competent authority (*b*) is empowered by paragraph (2) to make orders prohibiting or restricting the doing on any particular land of any such work as may be specified in the Order.

It is forbidden, by paragraph (3), to remove, alter or tamper with any work done or thing placed in pursuance of the Regulation, except with permission from a competent authority.

(b) *To Requisition* (*Regulations 51 and 52*).

(i) *Generally*.—A competent authority (*b*) is empowered by Regulation 51, para. (1), to take possession of any land and give such directions as appear to the authority to be necessary or expedient in this connection. While the land is in the possession of the authority it may (paragraph (2)) be used in any manner and for any purpose for the purposes of the public safety, for the defence of the realm or prosecution of the war or for maintaining essential services or supplies which the authority thinks expedient, notwithstanding any restriction imposed by any Act or other instrument or otherwise, and the authority, or persons using the land under the authority, may do anything which any person having an interest in the land would be entitled to do by virtue of that interest (paragraph (2) (a)). The authority may also prohibit or restrict the exercise of rights of way over the land, and of other rights over it enjoyed by any person, whether by virtue of an interest in land or otherwise (paragraph (2) (b)).

The owner or occupier is required, on request by a competent authority, to furnish to the authority such information in his possession relating to the land as may reasonably (*c*) be demanded of him in connection with the execution of the regulation (Regulation 51, para. (3)).

A competent authority may (Regulation 51, para. (6)) delegate all or any of its functions under the paragraphs (1) to (3) dealt with above to any specified persons or class of persons.

This regulation supersedes so much of section 19 of the Defence

of Supply; the Minister for the purpose of the Civil Defence Act, 1939, the Postmaster-General, and the Commissioners of Works.

(*c*) There is no definition of the term "reasonably", but all the powers given in Regulations 50 and 51 are expressed to be exercisable if it appears to be necessary or expedient in the interests of the "public safety, the defence of the realm, the efficient prosecution of the war, or the maintenance of supplies and services essential to the life of the community".

Act, 1842, as amended, as relates to putting the Crown into immediate possession of land, which is, by paragraph (4), suspended during the continuance in force of the regulation. This also applies to the Air Force (Application of Enactments) (No. 1) Order, 1918.

(ii) *For purposes of H.M. Forces.*—Regulation 52, para. (1), confers powers on a Secretary of State or the Admiralty to authorise the use of any land for military purposes or air force purposes (*d*) or for any of the purposes of the navy and gives powers in this connection similar to those in paragraphs (2) (a) and (b) of Regulation 51 (*see* above). Where land is used under this regulation, the Secretary of State or the Admiralty may make by-laws under the Military Lands Acts, 1892 to 1903 (paragraph (3)). This regulation supersedes the Military Lands Act, 1892, ss. 14 (1) (proviso), 16, 17 (1) and the Military Lands Act, 1900, s. 2 (2) (3), which are suspended during the continuance in force of the regulation (paragraph (2)).

(c) *To Enter and Inspect (Regulation 85).*

Any member of His Majesty's Forces in the course of duty and any person authorised by a competent authority (*e*) may enter on land in order to exercise any of the powers conferred by any regulation (paragraph (1) (a)); may enter and inspect any land in order to determine whether and in what manner any such powers are to be exercised in relation to the land (paragraph (1) (b)); and may pass over any land (with or without animals or vehicles) for any purpose connected with the defence of the realm, the prosecution of war, the securing of public safety or the maintenance of essential supplies and services (paragraph (1) (c)).

(d) *To Require Accommodation for Billets.*

Under Regulation 22 a "billeting officer" appointed by the Minister of Health or the Commissioners of Works may serve written notice on the occupier of any premises requiring the occupier to furnish such accommodation by way of lodging or food or both and either with or without attendance (paragraph (1)). Where a room is required by a billeting notice to be devoted exclusively to any person, notwithstanding anything in any contract, no other person may occupy the room (paragraph (2)). The price paid

(*d*) These expressions are by para. (4) defined as in the Military Lands Act, 1892, s. 23, as applied by the Air Force (Application of Enactments) (No. 1) Order, 1918.

(*e*) For definition of this expression, see note (*b*), *supra*. By para. (2) of Regulation 85 a competent authority is empowered to delegate, to any extent it thinks fit, its functions under para. (1) to any specified persons or class of persons.

for such accommodation shall be fixed by the Minister of Health and payable by him (paragraph (5)). Appeal against a billeting notice may be made to a tribunal constituted in accordance with rules made by the Minister of Health (paragraph (9)). The regulation does not relate to billets authorised by the Naval Billeting Act, 1914, or the Army Act or the Air Force Act.

(2) POWERS AFFECTING AGRICULTURE AND FISHERIES. (REGULATIONS 61—68).

These regulations give wide powers to the Minister of Agriculture and Fisheries to control agriculture and fisheries; he is empowered by Regulation 66 to delegate these powers wholly or in part (*f*), and to make provisions as to the procedure of any bodies to whom such functions are delegated.

(a) *Agriculture.*

The Minister may (Regulation 61) make orders, to operate either generally or in a particular area, directing that land which, at the time of making the order, is agricultural land (*g*) shall not be used for other purposes without leave (paragraph (1)). No such order shall restrict the use of land on behalf of His Majesty (*ibid.*, proviso). It is an offence, punishable with a fine not exceeding £50, to trespass on land specified in such an order, provided that warning notices to this effect are posted where they can be easily read and seen (paragraph (2)).

By Regulation 62 the Minister is given powers completely to control the cultivation of agricultural land, its management or use; there is no appeal against any order or direction he may give, and it is an offence (as to penalties, see *infra*) to contravene or fail to comply with such an order. Moreover, where the land is held by a tenant, the Minister may by notice to the tenant and landlord terminate the tenancy for failure to comply with the directions of the Minister (paragraph (1)). There is an additional power under paragraph (2) enabling the Minister to terminate a tenancy upon the taking possession of any agricultural holding (*h*) if it appears to him that the tenant is not or was not cultivating

(*f*) Two such orders have been made: Cultivation of Lands Order (S. R. & O., 1939, No. 1078), and Cultivation of Lands (County Boroughs) Order (S. R. & O., 1939, No. 1079).

(*g*) "Agricultural land" is defined by Regulation 100, and includes any land used as arable, meadow or pasture ground, for a plantation, wood or the growth of saleable underwood; land exceeding a quarter of an acre used for poultry farming, market gardens, nursery gardens, orchards or allotments (including those within the Allotment Act, 1922); but excludes land occupied together with a house as a park or pleasure grounds or garden other than market or allotment garden, land kept for sports or recreation, or racecourses.

(*h*) These expressions have the meanings assigned to them in the Agricultural Holdings Act, 1923 (para. (5)).

it according to the rules of good husbandry (*h*). The termination of any tenancy under this regulation is to be treated as the termination of the tenancy for the purposes of the Agricultural Holdings Act, 1923, and the provisions of that Act determining the respective rights of the landlord and tenant upon termination or upon quitting by the tenant, except sections 12—14 (which relate to compensation for disturbance) are to apply accordingly (paragraph (3)). It is provided that termination of the tenancy under the regulation is not to imply that the landlord has given notice to quit or to terminate the tenancy (*ibid.*). Paragraph (4) of Regulation 62 provides that where agricultural land is taken under Part IV of the Regulations (*i.e.*, Regulations 49 to 78) the Agricultural Holdings Act, 1923, ss. 1—8 is to apply as if the person taking possession became entitled under a contract of tenancy made at the beginning of the period for which possession is retained and determined at the end of that period.

The Minister is empowered by Regulation 63 (1) to authorise the entry on land at any time for the purpose of killing or taking hares, rabbits, deer, or any specified class of birds (including birds' eggs (paragraph (2)), vermin or pests, and to make provision for their keeping or disposal. This regulation is designed to prevent injury to crops and to minimise wastage of pasturage.

Regulation 67 extends the definition of the term "agricultural land" in the Agricultural Returns Act, 1925, to include land used for poultry breeding or keeping.

It may be necessary in agricultural leases henceforth to insert a covenant by the tenant that he will do nothing to enable the Minister to take possession or determine the tenancy. Where sporting rights are reserved the landlord equally should covenant to exclude any action which will bring these regulations into operation.

(b) *Fisheries.*

Similar powers to those affecting agriculture are granted to the Minister in respect of fisheries. It is not necessary to deal with these at length, but it may be stated shortly that the Minister may, by Regulation 64, give directions with respect to the cultivation, management and use of any several fishery as he thinks fit (paragraph (1)). He may make orders with respect to the taking and sale of fish (paragraph (2) (a)), prohibit or regulate the taking of any fish (paragraph (2) (b)), and authorise the destruction or taking of any birds or birds' eggs which are likely to be injurious to fisheries (paragraph (2) (c)). Orders under this regulation may apply generally or in a particular area (paragraph (3)).

The Minister is further empowered by Regulation 65 to suspend fishing rights in any specified waters and to vest such rights in himself and in any persons licensed by him; whereupon no other person may take, kill or injure fish in the specified waters.

(c) *Trees.*

The felling and sale of trees is controlled by Regulation 68 as amended by Article 16 of the Defence (Amendment) Regulations (S. R. & O., 1939, No. 978).

The Minister of Supply is given powers to regulate and restrict the felling of trees and the sale of growing trees for felling, and to control the price at which the latter may be sold (paragraph (1)). Orders may be made (*i*) applying to trees generally or to particular classes of trees, to have effect throughout the United Kingdom or in particular areas, and they may make different provision for different classes of trees and prohibit the doing of anything regulated by the order except under licence (paragraph (2)). Any person authorised by the Minister may mark or otherwise identify any trees affected by an order (paragraph (3) (a)). The Minister has power to cause any growing trees to be felled if he considers it necessary for the maintenance of essential supplies (paragraph (3) (a)).

Purchasers of land on which there is growing timber or trees of marketable value must now make inquiry concerning such orders.

(3) MISCELLANEOUS MATTERS.

Readers are also referred to Regulations 12 to 16, which give powers to a Secretary of State or the Admiralty to regulate access to certain premises and areas. Regulation 12 gives powers to declare premises "protected places", and Regulation 13 deals similarly with "protected areas". Regulation 14 deals with by-laws respecting such places and areas, and Regulation 15 with trespassing and loitering therein. Regulation 16 empowers the stopping up or diversion of highways over or near defence works and protected places.

(4) PENALTIES.

The penalties for contravening or failing to comply with any regulation or order, rule, by-law, direction or requirement under any regulation are, on summary conviction, up to three months' imprisonment or £100 fine or both, or on indictment up to two years' imprisonment or £500 fine or both (Regulation 92).

As to legal proceedings see Regulations 78 and 93.

(*i*) See Control of Growing Trees (No. 2) Order, 1939, which is now operative, and the Control of Timber Order, 1939, which deals with felled trees.

ACTION FOR DAMAGES ON A VOLUNTARY COVENANT.

Re Pryce, [1917] 1 Ch. 234;
Re Kay's Settlement, [1939] 1 Ch. 329.

By F. E. Farrer.

In *Kay's Settlement* a spinster voluntarily settled property on herself for life remainder for her issue as she should appoint in default for all her children who should attain twenty-one or being female marry. She also covenanted with the trustees to settle her after-acquired property. She married and had three children who were some of the defendants. After-acquired property fell under the covenant, but she told the trustees that they ought not to sue for specific performance or damages. The trustees then asked the Court what they were to do. Simonds, J., relieved them from suing for specific performance as they obviously could not do so successfully, their *cestuis que trustent* being volunteers, but with considerable reluctance absolved them for suing for damages. The trustees were thus protected, for they were the legal covenantees, and the children were defendants before the Court. He really felt bound by the opinion of Eve, J., in an earlier case which we presently state. But even so it is conceived that as a general rule such absolution from suing for damages should not as a rule be granted. At all events, where possible, one of the volunteer *cestuis que trustent* should be made one of the trustees.

In *Re Pryce*—the case above referred to—the defendant in contemplation of her marriage had settled funds on herself for life remainder for her intended husband for life remainder for the children of the marriage and if none attained a vested interest for the persons who would be entitled under the Statutes of Distribution if she had died intestate without having been married and she covenanted with the trustees to settle her after-acquired property on the same trusts. The husband died, there was no issue of the marriage, and property fell to be caught by the covenant. On summons by the trustees, the widow being defendant, Eve, J., held that the trustees could not sue for specific performance, but he added: "Nor could damages be awarded either in this Court, or

I apprehend at law where, since the Judicature Acts, the same defences would be available to the defendant as would be raised in an action brought in this Court for specific performance or damages." Accordingly he absolved the trustees from suing even at law.

It is submitted that the authorities cited below show clearly—

I.—That with one exception, that of a covenant to stand seised to uses, equity would never decree specific performance of a voluntary covenant, or even of a covenant with trustees on behalf originally of persons within a valuable consideration for the covenant, as, *e.g.*, issue of an intended marriage when there had been a failure of those persons and the covenant could be used only for benefit of people not within the consideration, *e.g.*, the covenantor's next-of-kin; but

II.—That trustees of such a covenant could sue at law and recover full damages for breach of such a covenant; and

III.—Could similarly sue in equity—but with this limitation in equity: that if the action was after the covenantor's death, the Court in administering the covenantor's estate would postpone the claim to that of creditors for value of the covenantor, ranking the claim prior to that of his legatees.

IV.—That Equity could not restrain an action at law, or execution of a judgment at law.

V.—Consequently that the Judicature Act could not affect the position of an action at law against the covenantor himself.

It is often said that a seal imports a consideration. The meaning of this when expanded is that a covenant must be under seal of the covenantor, that this means a deed, that a deed necessarily imports deliberation, and that the will of the covenantor on such deliberation is sufficient consideration to support action on any covenant which is valid in law (*a*).

"It was argued and Plowden 308 cited that the law from the deliberation and solemnity which accompanies the execution of a deed presumes the consideration, and delivers the obligee from the necessity of proving it, which must be done in actions upon simple contracts; that doctrine is right, but it applies only to cases where the deed is good on the face of it. There the will of the party who makes the deed is a sufficient consideration" (*b*).

Accordingly in *Low* v. *Peers*, an action on the covenantor's covenant to marry none other but the plaintiff, which is not

(*a*) The argument of Plowden himself in *Sharington* v. *Strotten*, Plowden 298, at pp. 308, 309.

(*b*) *Low* v. *Peers*, Wilmot 364, at pp. 382, 383, the judgment of Wilmot, C.J., delivering the unanimous judgment of the Exchequer Chamber.

equivalent to a covenant to marry the plaintiff, was held bad, no consideration but seal being averred.

We thus see, as is well established, that in an action on covenant it is not necessary at law to aver any consideration, except when the very land is claimed by *cestui que use*, under the old covenant by the covenantor to stand seised to his use, the reason for which exception will presently appear (*c*).

We will now go into the authorities. And first we will shortly discuss the old covenant to stand seised of land to the use of another, for a consideration thereof will show us that Equity before the Statute of Uses (27 Hen. 8, c. 10) would have specifically enforced such a covenant where the then equitable *cestui que use* was within the consideration of natural love and affection of the covenantor, though no other consideration was given for the covenant, but not in favour of any stranger to the covenantor.

The Statute of Uses (27 Hen. 8, c. 10) (*d*) enacted, shortly speaking, as follows that "where any person be seised or at any time hereafter be seised of . . . hereditaments . . . to the use of any other person or persons by reason of any . . . covenant or otherwise . . . that such person or persons that have or shall hereafter have any such use . . . shall henceforth be adjudged in lawful seisin . . . of and in the same hereditaments in such like estates as they had or shall have in the use . . . of the same".

Now that before this statute a covenant to stand seised to equitable uses in favour of one within the consideration of natural affection would have been enforced by subpœna by the Lord Chancellor on the covenantor, while such a covenant in favour of a stranger would not have been so enforced, is very clear, not only from the word "covenant" in the section, but from the cases we find decided only a very few years after that statute (*e*).

It was practically established in 7 & 8 Eliz. (*f*) that a use raised on such a covenant in favour of one within the consideration of natural love and affection only would be valid; while it was prac-

(*c*) Chitty, Pleading, 7th ed., Vol. I, p. 380; Bullen & Leake, 8th ed., 33, 39.

(*d*) Repealed as from the end of 1925.

(*e*) The earliest reported case I have found on a covenant to stand seised is *Northumberland's Case* in 34 Hen. 8, in which in consideration of money and marriage the Earl after the statute covenanted to be seised to the use of his then intended wife for life, remainders over, and the statute was held to execute the uses conveying the legal estate accordingly: Brooke Abr., Feoffments al Uses, pl. 16. A covenant to stand seised, etc., for a money consideration only would operate as a bargain and sale and require enrolment accordingly. See *Bedell's* Case, 7 Coke, at 40 (b).

(*f*) *Sharington* v. *Strotten*, Plowden 298: covenant to stand seised to use of covenantor for life, remainder to use of his brother and his brother's wife for their lives, remainder to use of the heirs male of the body of covenantor, the last limitation under the rule in *Shelley's Case* giving the covenantor a remainder in tail male.

tically established in 2 & 3 Eliz. (*g*) that a use so raised in favour of a stranger to such consideration, *e.g.*, an illegitimate son of the covenantor—in law the son of no one—would not in general be executed by the statute.

The consideration of natural love and affection included the covenantor himself, who by virtue of the statute could himself take an estate under his covenant, provided someone else took an estate also (*h*), or could even covenant to stand seised to uses to take effect only after his own death (*i*): and any descendant or other blood relation of the covenantor, and the wife or husband of the settlor or any such relation (*k*).

Now let us suppose that after the statute A covenanted for himself and his heirs with B, his illegitimate son, in consideration of natural love to stand seised of Blackacre to the use of B in fee—this as an assurance under the statute of the legal estate was ineffective—but Dodderidge in the Touchstone (*l*) raises the question whether B could not sue his father in damages; his words are: "and yet perhaps upon such a covenant as this whereupon no use nor estate doth arise an action of covenant may be". I know no other authority on this particular point: one conceives that the doubt lay on this, there was no covenant for further assurance, a covenant to stand seised had become regarded rather as a common form of assurance of the legal estate, and not really as an actionable covenant at all.

Be this as it may, on a covenant to stand seised, it is clear that at law in other cases an action lay on a voluntary covenant.

As a general rule, undoubtedly there should be no covenant except perhaps for further assurance inserted in a voluntary conveyance, unless for special reason (*m*).

(*g*) *Gerrard* v. *Worseley*, 3 Dyer 374 b: to the same effect, *Perrot's Case*, 2 Rolle Abr. 785, pl. 5; *Frampton* v. *Gerrard*, *ib.*, pl. 4, where the consideration was the marriage of the covenantor's bastard daughter: Co. Litt. 123 (a) and note; Shep. T. 511; Sanders, Uses, II, 98, 99; but whether if the covenant were to the use of a relation for life, remainder to the use of the bastard son for life, remainder to the use of a relation, the mediate remainder might not be good because of the last remainder: see *Bould* v. *Winston*, 2 Rolle Abr. 786, pl. L.

(*h*) *Sharington* v. *Strotten*, Plowden 298; *Flavell* v. *Ventris*, 1 Rolle Abr. 676 F; Sanders, Uses, I, 136.

(*i*) Sanders, Uses, II, 97, note.

(*k*) *Sharington* v. *Strotten*, *supra*; 2 Rolle Abr., p. 785, pl. (1), (2); Sanders, Uses, II, 98.

(*l*) Shep. Touchstone 512. Now that the Statute of Uses has been repealed as from the end of the year 1925, if A subsequently were voluntarily to covenant to stand seised to uses of Blackacre, it is conceived if *cestui que use* was within the consideration of natural affection, then that on the above authorities there would be a good declaration of trust in his favour, if not not; but that as there could be no pretence of such a covenant operating as an assurance of the legal estate, if the covenant were with a stranger to the above consideration, the stranger could sue in damages on the covenant.

(*m*) Platt, Covenants, 388.

In one case (*n*) W. Whitelock, in consideration of his natural love and affection for his nieces Margaret, the wife of W. T. Ward, and M. Hervey, assigned all his household goods, etc., to Joseph Ward, the plaintiff, upon trust for him W. W. for life, and after his death upon trust as to one moiety for his said niece Margaret and her husband absolutely, and as to the other moiety for his said niece M. Hervey, but if (as happened) she predeceased him, then for her two children. In the same deed he also purported to assign other property, the assignment whereof failed as an imperfect gift. He also in the same deed covenanted with Joseph Ward (the trustee) in the form of a covenant for further assurance. After the death of W. W., who had retained possession of the chattels, his executor, the defendant, though with notice of the deed, sold some of the chattels and retained possession of others. The trustee, Joseph Ward, having obtained leave to sue at law, in another's action for administration of W. W.'s estate, sued the defendant at law on the covenant and recovered verdict for £245 (*o*). The verdict was upheld, the Court of Exchequer holding that the covenant meant that W. W. and those claiming under him would not interrupt the enjoyment of the chattels by the parties contemplated.

Here we have the case of a sole covenantee, admittedly a trustee for others, on the face of the pleadings, recovering full damages at law on a voluntary covenant for his *cestui que trustent* (*p*), after the Vice-Chancellor had authorised his action.

It is very clear on this authority, even if it stood alone, that in 1845 the Court of Equity would not have granted injunction against an action at law, or enforcing a judgment at law in such case (*q*).

Now let us see how Equity would deal with the matter.

Thomas Hales (*r*), about to marry a second time, voluntarily conveyed Blackacre to trustees upon trust after his death for the four children of his first marriage: he covenanted with the trustees (not the children) for quiet enjoyment by the trustees and for further assurance. He afterwards acquired the interest of one of his four children who had gone bankrupt. Later he mortgaged Whiteacre belonging to him and also Blackacre: this mortgage at that time as to Blackacre took precedence of the interests of the

(*n*) *Ward* v. *Audland* (1847), 16 M. & W. 862.
(*o*) See *Hervey* v. *Audland* (1845), 14 Sim., at pp. 535, 537.
(*p*) Cp. *Fletcher* v. *Fletcher*, stated *infra*.
(*q*) *Hervey* v. *Audland*, *supra*; *Fletcher* v. *Fletcher*, 4 Hare, at p. 77.
(*r*) *Hales* v. *Cox* (1863), 32 Beav. 308. A voluntary bond comes within a direction in a deed to pay the settlor's debts: *Markwell* v. *Markwell*, 34 Beav. 12, p. 18.

four children. Thomas Hales died. The mortgagees sold under their power both Whiteacre and Blackacre for £11,148, and a surplus of £4,961 of the purchase money remained. Lord Romilly held (1) that the mortgage ought to be so marshalled as to throw three-fourths of the whole mortgage debt if possible on Whiteacre, or of course on the proceeds of sale attributable to Whiteacre; (2) if there were not sufficient to discharge such three-fourths of the mortgage debt, then that under the covenant for quiet enjoyment with the trustees the three remaining children were entitled to prove against their father's estate for the damage they had sustained in his mortgaging the three-fourths of Blackacre to which he was not entitled (*s*), *only after the father's creditors for value had been paid,* but in priority to his legatees.

At the least then, the three children were treated as postponed creditors by virtue of the voluntary covenant entered into solely with the trustees.

In 1842 J. L. voluntarily (*t*) assigned annuities and policies on an existing life to J. B. and E. P. and covenanted with them for further assurance. By deed of even date the trusts were declared for J. L. and the plaintiff successively for their lives, and then for plaintiff's children. No notice of the deed was given to the grantors of the annuities of the insurance office. J. L. died. The plaintiff sued, stating it was doubtful whether the assignments were valid: but, if invalid, claiming that the properties assigned should be administered as part of J. L.'s estate. The Vice-Chancellor held that the covenant created a debt, and if J. L. died solvent must be performed; that it was inconvenient to send the case to law; that he did not say that the covenant would be decreed to be specifically performed, but all the covenantee wanted was damages; that he did not decide that the assignment was valid without the covenant, but that the covenant being there, he held the assignment operated to bind J. L.'s estate.

Again, E. L., by voluntary deed (*u*) kept by him and never communicated to the trustees, in consideration of his love for his two illegitimate sons John and Jacob, covenanted to pay the trustees within a year after his death £60,000 to be held in trust for such of them John and Jacob as should survive him and attain twenty-one, which Jacob alone did. E. L. died and Jacob sued the defendants as executors of E. L., and apparently also the trustees were defendants. The defendant executors admitted

(*s*) Debt on voluntary specialties was after testator's death in administration of his assets, at all events by the Court, postponed to debts for value. See authorities noted *infra*, p. 77, n. (*x*).

(*t*) *Cox* v. *Barnard* (1850), 8 Hare 310, Knight Bruce, V.-C.

(*u*) *Fletcher* v. *Fletcher* (1844), 4 Hare 67, Wigram, V.-C.

assets; the defendant trustees said they declined to accept the trusts, but were willing to act on indemnity.

The Vice-Chancellor held that the trustees could have recovered the money; the covenantor was liable at law on the covenant and the Court was not asked to do anything to perfect the deed; that had the trustees accepted the trust Jacob could have compelled them to enforce the covenant; that their refusal to accept the trust could make no difference; that if Jacob had been the covenantor he could have enforced the covenant out of E. L.'s assets; that had the trustees chosen to sue there would have been no equity in E. L.'s estate to restrain them from so doing; that if the trustees would not sue the *cestui que trustent* had right in the name of the trustees to sue at law, or if it were unnecessary to have the case decided at law, then to sue in equity. Accordingly he declared that the deed constituted a debt at law and payment thereout to the plaintiff out of testator's assets.

Accordingly the position before the Judicature Act was that debts on voluntary covenants were suable in damages at law, or in equity, assuming always that equity would have entertained an action against a living covenantor and not left the plaintiff to action at law: but that if the debtor had died, in the administration of his estate, at all events by the Court, such a debt was postponed to all debts for value (*x*) of the covenantor. But if the covenantor was sued to judgment in his life how could this limitation apply?

But though, as we have seen, Equity would decree specific performance of a voluntary covenant to stand seised to equitable uses before the Statute of Uses in favour of a *cestui que use* within the consideration of natural love to the covenantor, it seems clear that it would not decree specific performance of any other voluntary covenant even in favour of one within such consideration.

Thus a father voluntarily conveyed (*y*) to trustees freeholds and covenanted to surrender copyholds to the trustees upon certain trusts during his life, and after his death for his three daughters by his first marriage; he died without surrendering the copyholds, devising them to his second wife, who was admitted; the daughters filed a bill against the widow and the trustees, asking for a decree on the widow to surrender the copyholds to the trustees of the settlement. Lord Cottenham, L.C., dismissed the bill.

An exception to this rule was attempted to be introduced by

(*x*) *Hales* v. *Cox*, 32 Beav. 308, discussed above; *Markwell* v. *Markwell*, 34 Beav., at p. 18; *Blount* v. *Doughty*, 3 Atk. 481, at 483; *Re Earl of Lucan*, 45 Ch. D. 470, 473.

(*y*) *Jefferys* v. *Jefferys* (1841), 1 Cr. & Ph. 138.

Fry, J. (*z*) in a case in which a widow, having children by her first marriage, in consideration of her intended second marriage covenanted to surrender copyholds to trustees upon trust for herself for life, remainder upon trust for her children by her first marriage. Fry, J., after the settlor's death, decreed the specific performance of the covenant at the suit of one of the children of the first marriage. But this exception cannot, it is conceived, stand; the only persons interested in the covenant were volunteers, strangers to the consideration of the second marriage.

The true principle seems to be this: if persons within the consideration for the covenant sue for its specific performance, and the interests of others outside that consideration are so commingled with the interests of the plaintiffs that their interests cannot be disentangled from the outsider's interests, then that the action of the former will carry also the benefit of the decree to the latter (*a*). Only the husband and wife and issue of their marriage are within the consideration of marriage (*b*), which is, of course, as between the husband and wife and their issue the highest consideration known to the law (*c*); though a settlement made by a relation in consideration of the marriage of his relation, *e.g.*, a settlement made by a father on a child's marriage, is for value, though not for such high value (*d*).

Later illustrations of the rule that a mere volunteer or trustee for him cannot obtain specific performance of a voluntary covenant will be found in the cases mentioned below (*e*).

In *Re Plumptre* (*e*) Eve, J., held that the trustees' action at law on the wife's covenant to settled after-acquired property was barred by the Statute of Limitations, and as the *cestui que trustent* under the settlement were volunteers, *viz.*, the wife's next-of-kin, they had no equity to enforce the covenant: and accordingly that the trustees need not take any steps.

If before the Judicature Act (*f*) equity would have restrained action at law on a voluntary covenant, which it would not, or if it had been possible at all to sue in equity the covenantor himself for *damages*, would then have dismissed such suit—in which latter case equity could not have allowed proof, as it did, against his

(*z*) *Gale* v. *Gale*, 6 Ch. D. 144.
(*a*) See *De Mestre* v. *West*, [1891] A. C. 264, 270; *Att.-Gen.* v. *Jacomb Smith*, [1895] 2 Q. B. 341.
(*b*) *Att.-Gen.* v. *Jacomb Smith*, [1895] 2 Q. B., pp. 348, 353; *Pullan* v. *Koe*, [1913] 1 Ch. 9.
(*c*) *Att.-Gen. for Ontario* v. *Perry*, [1934] A. C., p. 484.
(*d*) [1934] A. C., pp. 484 *et seq.*; but this would not apply where the child marrying was illegitimate. See *Frampton* v. *Gerrard*, 2 Rolle Abr., pl. 4.
(*e*) *Re Anstis*, 31 Ch. D. 596; *Re Plumptre*, [1910] 1 Ch. 609, 618.
(*f*) Jud. Act. 1925, ss. 39, 40, 41, and their antecedents.

estate in an administration action after his death—then no doubt the effect of the Judicature Act would have been to annihilate the action at law: otherwise I respectfully fail to see what the Judicature Act has to do with the matter. On occasion, especially when otherwise in practical effect a child would be suing its father or mother, it may be very useful that the Court should exercise a discretion to direct the trustees not to sue at law. If the children in such case be parties, the trustees will then be completely protected against any charge of breach of trust for the trustees not so suing. But it is respectfully submitted that such a direction should be expressly given as under the discretion of the Court not to enforce the particular trust to sue against the trustees who are *at law* the only holders of the legal chose in action and the only persons entitled to the damages.

But it is difficult to see how equity as late as 1917 can reverse by decision settled authorities both at law and in equity.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Conveyance under the School Sites Act—determinable fee—elementary education.—Re Cawston's Conveyance, [1939] 3 All E. R. 1, carries the decision in *Dennis* v. *Malcolm*, [1934] Ch. 244, slightly further, because in this case consideration was given for the grant and in the earlier case it was voluntary. In 1883 a conveyance was made to trustees in fee simple for the purposes of the School Sites Act. In 1938 the school was closed after having been used as an elementary school. Simonds, J., held that the closing of the school had the effect of bringing into operation the statutory right of reverter under the School Sites Act and divested the legal estate from the trustees.

A subsidiary point was taken. It was argued that the conveyance had never been enrolled and that, therefore, it was void under the Statutes of Mortmain. It was contended that it was not within the exception of the Public Parks, Schools, etc., Act, 1871, because the purpose was for " the education of children and adults or children only of the labouring manufacturing and other poorer classes ", and so was not " an elementary school ", but this contention was rejected.

It may be noted that no attempt was made to discuss the exact position of the legal estate in such a case. It appears to have been assumed here, as in *Dennis* v. *Malcolm* (*supra*), that under section 7 of the Law of Property Act, 1925, the legal estate was vested in the trustees not as settled land. Whether the right of reverter can subsist in equity only is another question which was not raised. The question might have been important had the trustees in fact conveyed to a purchaser and only subsequently claim had been made, because if the right of reverter only subsists in equity it may require registration for its protection, but not where it is created prior to 1926. The question would have been simply a question of equitable notice in this case. If the legal estate was settled land it is submitted that in the absence of any vesting order by the Court the legal estate would remain vested in the trustees until conveyance was made to the persons entitled

under the reverter. No doubt the point raised cannot often arise in practice, but this decision only carries the problem one step further and within its limits is important, because it applies the reverter to a grant in fee simple for full consideration.

Undivided shares—statutory trust for sale—acquisition under the Limitation Acts.—Re Landi (1939), 55 T. L. R. 969, is of greater interest on the general character of the statutory trust for sale than the actual point decided under the Real Property Limitation Act, 1833, in view of the Limitation Act, 1939.

A and B were tenants in common of certain premises in which they resided until 1923. After 1923 they ceased to reside and the rents were paid to A who did not account for them to B. B died in 1935, and the question subsequently arose whether A had acquired a title by adverse possession after the lapse of twelve years under section 12 of the Real Property Limitation Act, 1833, which expressly provided for acquisition by adverse possession by one of several tenants in common. The Court of Appeal held that the effect of the creation of the statutory trust for sale was to prevent the application of the Real Property Limitation Act, 1833, on the ground that A was now a statutory trustee for sale and, therefore, could not acquire a title by adverse possession. The decision was particularly strong, because it does not appear in what circumstances the Act, though unrepealed, can now apply, and, furthermore, the Court held the view taken notwithstanding section 12 of the Law of Property Act, which provides that nothing in this Part of the Act affects the operation of any statute of limitation.

The essential reasons given by the learned Master of the Rolls may be regarded as two-fold and are equally important. First, that the claimant by adverse possession is a trustee and under the transitional provisions might be the Public Trustee. This emphasises the change in the character of ownership of property held in undivided shares in equity as something more than mere conveyancing machinery. It may be convenient here to point out that practical experience has shown a danger in this connection where one co-owner wishes to acquire the severalty. Here a trustee is purchasing trust property and by law he cannot do this from co-trustees. He can do so where all the beneficiaries are *sui juris* and absolutely entitled, and provided proper care is taken to make full disclosure, but where any share is not vested in equity in persons who fall within this category it seems that his

only course is to apply to the Court. This point is mentioned because it is apt to be overlooked, but in the light of this decision there can be little doubt about the view that would be taken of such a transaction by the Court. Secondly, the learned Master of the Rolls emphasised the fact that the circumstances envisaged by the Limitation Act, 1833, no longer existed. The legal owner can never receive the rents and profits for his own benefit, although he may be a beneficiary as well as trustee. The Master of the Rolls instanced the fact that on the death of one legal joint tenant entitled in equity in common the personal representatives were not entitled to collect the rents and profits, although formerly, of course, such right vested in a tenant in common automatically passed to his personal representatives. As was pointed out in the judgment, no statute of limitations could run against the personal representatives in such circumstances.

Reference has been made in these columns before to the effect of the provisions of the Property Act in modifying the rights of persons beneficially interested in land held under the statutory trust for sale, but no case has been decided before which brings out so clearly the radical changes effected. "The interests of co-owners being now interests which merely entitle them to enforce the trusts for sale and to secure by proper means their proper share of the proceeds and the rents until sale" (*per* Greene, M.R., at p. 576) an undivided share is not land (see L. P. A., s. 205), and, it is submitted, the rights of the co-owner are not rights in land properly so called at all. The distinction, having now been clearly drawn, should be closely watched by practitioners because it will lead to further results.

Settled land—improvements—conversion of dwelling-houses into shops and flats—reasonably necessary or proper to enable the same to be let.—The decision in *Re Swanwick House, Prestbury*, [1939] 3 All E. R. 531, will be welcomed by tenants for life under the Settled Land Act. Swanwick House was a Georgian dwelling-house formerly let at £90 per annum but at the time of the summons unoccupied; a cottage and shop, let on monthly and yearly tenancies respectively, adjoined it. Simonds, J., held that the conversion of the whole of these premises into shops with flats over them was an improvement wholly chargeable to capital under Schedule III, Part I, para. xxiii of the Settled Land Act, 1925—"Additions or alterations to buildings reasonably necessary or proper to enable the same to be let".

On the same provision in section 13 of the Settled Land Act, 1882, it was held that additions meant structural additions, and presumably this applied to alterations (*Re Blagrave's S. E.*, [1903] 1 Ch. 560; that " reasonably necessary and proper " meant " something which, though not absolutely necessary, a reasonable and prudent owner of property, if he were absolute owner, would do " —*per* Buckley, J., in *Stanford* v. *Roberts*, [1901] 1 Ch. at p. 444; and that there must be a present intention to let (*Stanford* v. *Roberts*, *supra*). Pulling down and rebuilding a vinery and peach house, however, was not allowed in *Re Leveson-Gower's S. E.*, [1905] 2 Ch. 95.

The judgment in *Re Swanwick House* gave no reasons, possibly because the application of the tenant for life was supported by counsel for the Public Trustee and the infant tenant in tail. It was argued that the reconstruction would enable the property to be let to the best advantage and whether the unaltered house would have let at all was not discussed, though the report—and general experience—indicates it would not have let. The case seems to give the Court discretion to allow reasonable modernisation of property for letting, and may be compared with the decision as to mansion-houses in *Re Insole's S. E.*, [1938] 3 All E. R. 406 (noted *ante*, Vol. 3, at pp. 81, 82).

F. R. C.

Agreement for lease—" Acceptance subject to a lease to be drawn up by our client's solicitors ".—H. C. Berry, Ltd. v. *Brighton and Sussex Building Society*, [1939] 3 All E. R. 217, decided that where an offer to take a three-years' lease on behalf of the landlord " subject to a lease to be drawn up by our client's solicitors " neither party was bound until and unless the lease was actually exercised. In holding this Farwell, J., adopted the reasoning of P. O. Lawrence, L.J., in *Raingold* v. *Bromley*, [1931] 2 Ch. 307, where he said, at p. 315: " An agreement to grant a lease which is conditional on an agreement being reached as to the terms to be contained in it is not an enforceable agreement. It is not as if the alleged agreement in the present case were an agreement defining all the essential terms of a lease subject only to the approval by the solicitors of the form of the lease; in such a case it might be held that there was a concluded agreement leaving merely the terms of it to be reduced into proper form by the solicitors. . . . [In *Raingold* v. *Bromley*] no concluded bargain would be reached until the lease had been executed . . . even although the negotiations as to the terms to be contained in the

lease had been brought to a conclusion by agreement between the solicitors of the parties." Farwell, J., saw no difference between the words "subject to the terms of a lease" in *Raingold* v. *Bromley* and those in the case before him; the latter did not import a condition to be fulfilled by agreement between the solicitors.

The decision indicates that there is probably no difference between agreements "subject to lease" and agreements for sale "subject to contract", for in the latter the test is, whether the signing of the contract is necessary to a binding agreement, or whether the parties merely desire formal expression of agreed terms (see *Chillingworth* v. *Esche*, [1924] 1 Ch. 97, and cases there cited). In regard to both leases and sales there seems a strong tendency to hold that until the formal document is executed or signed either party can escape at any moment.

F. R. C.

Easement of support—demolition of adjoining house under clearance order—liability for interference.—Bond v. *Norman*, [1939] 2 All E. R. 610, and *Bond* v. *Nottingham Corporation*, [1939] 3 All E. R. 669, were consolidated actions both arising out of a clearance order made by the corporation and confirmed by the Minister of Health under the Housing Act, 1930. The plaintiff was entitled to an easement of support for his own premises from the premises of the defendant Norman ordered to be demolished. In the first action he obtained an injunction restraining Norman from demolishing without leaving, or providing, equivalent support (see *Bower* v. *Peate* (1876), 1 Q. B. D., at p. 307). Simonds, J., said there was no authority to show that the demolition would cease to be a voluntary interference with the easement because it was done in pursuance of a clearance order, and in any event there was no compulsion, for if Norman did not demolish the only result was that the corporation had a duty to do so and charge him with the costs. When the second action was heard the extended time for demolition by the owner had expired and under section 26 (3) of the Housing Act, 1936, the corporation had a positive duty to enter and demolish. Here Simonds, J., held that nothing in the Housing Act, 1936, justified a departure from the principle that an Act of Parliament must not be construed so as to interfere with private rights unless this is absolutely necessary (*Att.-Gen.* v. *Horner* (1884), 14 Q. B. D. 245), and therefore granted an injunction to restrain interference with the easement.

The learned Judge refused to deal with the wider contention that, even if there were no easement, any exercise of the statutory

duty of demolition which injured premises outside the area would be a negligent demolition for which the corporation would be liable (see *Geddes* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430). Such a construction would have given the plaintiff a better right against the corporation than against Norman, who would have owed no duty of support in the absence of an easement.

F. R. C.

Special power of appointment—release as regards one particular object—no distinction between release and covenant not to exercise power.—Re Brown's Settlement, Public Trustee v. *Brown*, [1939] 3 All E. R. 391, raises an interesting point on special powers. In the events which happened a special power of appointment was exercisable by a surviving wife in favour of three children and a granddaughter. In 1928 the wife, by deed poll, purported to release the power so as absolutely to preclude herself from appointing to the granddaughter; by her will in 1937 the wife, who died in 1938, appointed one-third of the property to a child for life and thereafter to the granddaughter absolutely. Morton, J., held the release valid and the appointment to the granddaughter void.

A person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power (section 155, Law of Property Act, 1925, replacing Conveyancing Act, 1882; *Re Evered*, [1910] 2 Ch. 147), even though the object or effect of the release is to benefit the appointor (*Re Somes*, [1896] 1 Ch. 250). The above rule does not apply to powers in the nature of a trust (*Re Eyre* (1883), 49 L. T. 259), while Settled Land Act powers can only be released by statutory owners and possibly only when the statutory owner is not a trustee of the settlement (*Re Craven S. E.*, [1926] Ch. 985). A covenant, even though voluntary, not to exercise a power operates in equity as a release of the power (*Farwell on Powers* (3rd ed.), p. 19). In *Re Evered* (*supra*) the Court of Appeal said a covenant not to appoint to a particular beneficiary would be good.

In this state of the authorities counsel in *Re Brown's Settlement* sought to distinguish a covenant not to appoint to a particular beneficiary from a release as regards that beneficiary, but Morton, J., after reviewing the authorities said (at p. 397): "I cannot see any good reason why I should hold that a donee of a power may not by deed release the property subject to the power from the power, so far as relates to a particular object, with the

intent of precluding himself from appointing in favour of that object."

Why the release was made does not appear from the report; normally the object of such transactions is to create vested interests in default of appointment where this cannot be done by way of appointment—*e.g.*, where the power is exercisable by will—for neither specific performance nor damages will be given on breach of a contract to exercise a special power (*Palmer* v. *Locke*, 15 Ch. D. 294).

F. R. C.

Right of way—user for horses and carts—whether right to use for motor traffic.—In *Lock* v. *Abercester, Ltd.*, [1939] 3 All E. R. 562, the question was whether user for over forty years of a carriage way to premises formerly a rectory but now used for agricultural purposes justified motor traffic over the way; Bennett, J., said, at p. 565: "As a matter of law, I decide that, where proof is given of a user over the required period by carriages drawn by horses, so as to establish a carriageway as an appurtenance, the right which is acquired is one which enables the owner of the property to which the road is an appurtenance to use the way with mechanically propelled vehicles." The decision is in line with *Att.-Gen.* v. *Hodgson*, [1922] 2 Ch. 429, where it was held that a grant in 1861 of "a right of carriage horse and footway" justified motor traffic over the way.

The present decision seems to add a gloss to the rule that a way by prescription must be measured and defined by the extent of the user (*Cowling* v. *Higginson* (1838), 4 M. & W. 245). Apparently if user by all available means be proved, the right will extend to user by a new means of conveyance provided this has been generally adopted. The extent of a right of way by grant must be ascertained by construing the document with reference to the circumstances at the time of the grant, particular attention being paid to the nature of the way, *e.g.*, width, surface, and of the dominant tenement (*Cannon* v. *Villars* (1878), 8 Ch. D. 415).

It is perhaps a pity that little was made in *Lock* v. *Abercester, Ltd.* of the change from a rectory to a farm although it appeared the latter required more goods than the former. Yet a prescriptive right of way for agricultural purposes has been held not to give a right for mineral purposes (*Bradbury* v. *Morris* (1876), 3 Ch. D. 812) or a right to cart building materials when a farm was built over (*Wimbledon Conservators* v. *Dixon* (1875), 1 Ch. D. 362). Where there is an express grant, however, it seems that the burden

may often be increased within reasonable limits by alteration in the dominant tenement (*Finch* v. *G. W. Ry.* (1879), 5 Ex. D. 254) —for example, by conversion of a dwelling-house into an hotel (*White* v. *Grand Eastbourne Hotel, Ltd.*, [1913] 1 Ch. 114)—and it has been suggested that these cases have altered the rule as to ways by prescription (see *Bailey & Son* v. *Holborn & Frascati, Ltd.*, [1914] 1 Ch. 598).

F. R. C.

Forfeiture of lease—property mortgaged—notice of proceedings to mortgagee unnecessary—conditions of granting relief.—Where proceedings are taken to forfeit a lease for breach of a covenant other than that to pay rent a mortgagee, as underlessee, may under section 146 of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1929, apply for relief before, but not after, the action has terminated and the landlord re-entered (*Rogers* v. *Rice*, [1892] 2 Ch. 170). Therefore Sir Wilfred Greene, M.R., said in *Egerton* v. *Jones*, [1939] 3 All E. R. 889, at pp. 892–3: "Accordingly, in the case of a mortgage by sub-demise, that mortgagee is always at the risk of the lessor obtaining re-entry for breach of covenant without the mortgagee knowing anything about it; in which case the mortgagee is completely shut out. Every mortgagee, therefore, knows that that is the risk he runs. If after taking a covenant from his mortgagor to observe the covenants in the lease, he takes no steps whatsoever to satisfy himself from time to time that no breach of covenant is taking place, he is always exposed to the risk that the lessor will succeed in re-entering and so determining the lease; with the result that all possibility of relief from forfeiture is lost to the mortgagee."

In this case the mortgagees, having heard of and intervened in the proceedings, obtained relief from the Master on the terms (*inter alia*) of paying the lessor's costs against the worthless lessee. The mortgagees demurred, arguing that as the lessor had been given notice of their mortgage, he should have joined them as defendants or told them of the proceedings. The Court of Appeal, reversing Hilbery, J., rejected both contentions and restored the Master's order.

The decision indicates that it may be desirable in mortgages of leaseholds to make special provision for production of receipts for rent, rates and taxes, and from time to time to inspect the property, or inquire of the lessors whether any breach is complained of (the breach in this case was using the premises as a brothel). The covenant is not always drafted to include rates and taxes, but

the writer knew in practice of a case where mortgagees' security was prejudiced because a mortgagor succeeded by various means in becoming some years in arrear with these.

It would be possible to argue that a chargee by way of legal mortgage is not an underlessee and therefore could not claim relief, but it is thought that the Court would probably regard the right to relief as being available under section 87 of the Law of Property Act, 1925. This is the view taken in *Wolstenholme & Cherry's Conveyancing Statutes* (12th ed.), Vol. 1, at p. 488.

F. R. C.

Custom and Prescription—reasonableness—working of mines—claim to let down surface without making compensation.—In answer to an action for an injunction the defendants in *Newcastle-under-Lyme Borough Council* v. *Wolstanton, Ltd., and Duchy of Lancaster*, [1939] 3 All E. R. 190 and 597, pleaded a customary and prescriptive right to work mines in the manor of Newcastle-under-Lyme so as to let down the surface without paying compensation. Farwell, J., held that he was bound by *Hilton* v. *Granville* (1844), 5 Q. B. 701, where the same claim in respect of the same mines had been litigated and held unreasonable and invalid. The learned Judge agreed with the contention that so far as *Hilton* v. *Granville* said that there could be no express grant such as that claimed it had been overruled by *Rowbotham* v. *Wilson* (1860), 8 H. L. C. 348, but that did not affect the decision as a whole.

The Court of Appeal, although having the jurisdiction exercised in 1844 by the Court of Exchequer Chamber and therefore not strictly bound by *Hilton* v. *Granville* refused, on the principle of *stare decisis*, to interfere because "some more recent Judges, had they had to consider this question of law in 1844, might have been disposed to come to a different conclusion" (at p. 604). The Court adopted the statement in *Beal on Cardinal Rules of Legal Interpretation* (3rd ed.), p. 16: "The Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of Parliament itself, in matters affecting the rights of property, may fairly be treated as having passed into the category of established and recognised law."

It may be observed that a custom is invalid if unreasonable because otherwise it cannot have originated in right as opposed to accident or indulgence (*Salisbury* v. *Gladstone* (1861), 9 H. L. C.

692), whereas a prescriptive right, since prescription presumes a lost grant, must be reasonable in the sense that it must be capable of being granted (*Clayton* v. *Corby*, 5 Q. B. 415). In the case noted, Clauson, L.J., said (at p. 605) that little importance had been attached to the prescriptive claim and he only proposed to say that Farwell, J., had rightly held that " the decision on the point of custom covered the matter of prescription so far as raised by this appeal ". It would, therefore, seem that " reasonable " may have a wider meaning in prescription than in custom.

F. R. C.

Several fishery—exclusion of public's right to fish in tidal waters—necessity to prove grant before Magna Carta—mode of proof—need for possession.—The law relating to private fisheries in public waters was considered and applied in *Stephens* v. *Snell*, [1939] 3 All E. R. 622.

Prima facie the foreshore—that is, the land, whether on the seashore or in mouths of rivers, etc., covered and uncovered by the tides—belongs to the Crown subject to the public rights of fishing and navigation (*Blundell* v. *Catterall* (1821), 5 B. & Ald. 268). By statute, particularly the Crown Lands Acts, 1886 and 1927, control of the foreshore (parts of which have, of course, come into private ownership) is vested in the Board of Trade, but the rights of fishing and navigation, which seem to be the public's only rights, must not be interfered with (*Blundell* v. *Catterall* (*supra*); and see *Coulson & Forbes on Waters* (5th ed.), at pp. 24 *et seq.*).

The origin of this public right to fish in tidal waters is unknown; in *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada*, [1914] A. C. 153, Lord Haldane suggested that finding the right exercised from immemorial antiquity the Crown gave protection and this protection was gradually recognised as establishing a right enforceable in the Courts. Unless by custom or in an emergency the public cannot as of right use land above high-water mark for fishing purposes (*Mercer* v. *Denne*, [1905] 2 Ch. 538), nor can they claim access to the sea over private land (*Blundell* v. *Catterall* (*supra*); *Brinckman* v. *Matley*, [1904] 2 Ch. 323). Numerous statutes now regulate fishing by the public (see *Coulson & Forbes on Waters* (5th ed.), pp. 413—415).

A claim to a free or several fishery in tidal waters—the words mean the same—is a claim to exclude the public (*Malcolmson* v. *O'Dea* (1862), 10 H. L. C. 593). In that case Willes, J., delivering the opinion of the Judges, said (at p. 618): " But for Magna Carta,

the Crown could by its prerogative exclude the public from such *prima facie* right, and grant the exclusive right of fishing to a private individual either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public by Act of the Crown not later than the reign of Henry II. [Henry II died in 1189, from which date legal memory runs.] If evidence be given of long enjoyment of a fishery to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is not that you say, this is a usurpation, for it is not traced back to the time of Henry II, but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory." It may be remarked that in *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135, Lord Blackburn doubted whether Magna Carta really had this effect but considered the law settled by *Malcolmson* v. *O'Dea* (*supra*).

In *Stephens* v. *Snell* (*supra*) a fishing in the harbour of Axmouth was claimed and a charter roll of Edward III, dated 1331, was produced referring to two charters granted by "Lord Henry of famous memory, formerly King of England", one being witnessed by Thomas, Earl of Gloucester. Bennett, J., held that this Henry must have been Henry I or II, because no Thomas was Earl of Gloucester in Henry III's reign and if the two charters had been granted by different Henrys some distinction would have been made, and it could be presumed that Henry III would not have offended against Magna Carta.

The manor of Axmouth, including the harbour, later again became vested in the Crown and was re-granted by Henry VIII. Bennett, J., held this legal, following *Neill* v. *Duke of Devonshire* (*supra*), where Lord Blackburn (at p. 180) said it was illusory and contrary to law to say the Crown could not grant a several fishery in tidal waters since Magna Carta; it could do so if the fishery existed before Magna Carta. "If the tidal river in which there was a *prima facie* right to fish was appropriated by an individual or by the Crown before Magna Carta, that individual or the Crown, if the Crown has got it back, can grant it after Magna Carta."

From Henry VIII's time the plaintiff showed a good paper title, but this was not enough, for to establish a claim to a private fishery in tidal waters there must be proof of possession and enjoyment "without which even the clearest apparent title to a several fishery on paper only would not exclude the public right"

(*per* Lord Selborne in *Neill* v. *Duke of Devonshire* (*supra*) at p. 143). Successful actions by previous owners in defence of the fishery are a common form of evidence (see *Malcolmson* v. *O'Dea* and *Neill* v. *Duke of Devonshire*) and in *Stephens* v. *Snell* a successful action, by a former lord of the manor of Axmouth, for trespass on the fishery in the reign of George III was adduced. Bennett, J., held this sufficient and in consequence the claim to a several fishery succeeded.

F. R. C.

Restrictive covenants—building scheme.—Lawrence v. *South County Freeholds*, [1939] 2 All E. R. 503, is an important case to conveyancers for the very careful study of the law of building schemes by Simonds, J. The facts were very complicated and cannot be adequately stated in a short note since they take up nearly eleven pages of the report. They took place in or about 1843 and illustrate the difficulty of enforcing restrictive covenants in old cases. Here a large plot of land was developed by the same vendor, and substantially similar covenants were entered into by respective purchasers of different plots on which one or more houses were erected. Part of the land was developed by leases and then years after sold freehold. The difficulty which the learned Judge found primarily was that he could not discover any scheme originally to develop the property although there were references by plan to a substantial portion of the estate in connection with the deeds of covenant entered into by purchasers. Emphasis was laid upon two factors. First, that there must be a defined scheme of the property laid out in building plots and that scheme must be in existence at the date of the conveyance to the purchaser sought to be bound : see *per* Simonds, J., at p. 519. Secondly, the covenants must be entered into with a view to benefit the plots and not merely to enable the vendor to sell his land to greater profit to himself, and in this case the scheme was so early that the learned Judge found difficulty in attributing it to a vendor long before it was formulated by the Court, and this was aggravated by the fact that many purchasers would know little or nothing of other purchasers and their holdings.

Two other points arose for discussion. First, the learned Judge held that a restrictive covenant permitting " schools " did not permit " schools of music " or " schools of dancing " since those were not within the ordinary meaning of the term school. Secondly, the learned Judge held that if there had been a building scheme, then the purchaser of one plot could enforce the covenants against

a purchaser of another plot, where both plots originally formed part of a larger plot sold by the original vendor as a whole.

In this note we can only recommend the case for close attention where the question of framing a building scheme or enforcing an alleged building scheme arises.

Trustees—investment clauses—statutory and express powers.—*Re Warren*, [1939] 2 All E. R. 599, is of interest on the question of what amounts to a contrary intention to prevent trustees having a power to invest under the statute. In this case the testator had directed the trust fund to be invested in certain stocks with power to vary the investments within the specified class. The testator died in 1880. The trustee asked the Court whether he had power to invest in the securities authorised by the Trustee Act, 1925. Simonds, J., held that the trustee had such power. His reasoning was based in some measure upon the fact that though under the Trustee Act, 1925, s. 69 (2), the powers under the Act were subject to a contrary intention expressed in the instrument they must be interpreted in the light of the fact that the Act was a consolidating statute and under the Trustee Act, 1893, the power to invest was subject to the power being expressly forbidden. In construing a consolidating Act it is necessary to avoid a new interpretation of the existing law, if this is possible, as was held in *Re Turner*, [1937] Ch. 15 (noted *ante*, Vol. I, p. 272), where the statutory power of maintenance after twenty-one, though expressed in imperative form, was construed as permissive. Consequently, *Re Warren* (*supra*) must be applied only in terms of this particular section of the Trustee Act, 1925, and not generally upon the meaning of "contrary intention" within the Act.

Deed of arrangement—estoppel by conduct—separate act of bankruptcy.—The circumstances in which creditors who have taken part in proceedings leading up to a deed of arrangement may partition in bankruptcy are not naturally of considerable importance. It has been often held that conduct short of an actual assent to the deed may prevent them relying upon it as an act of bankruptcy, and this was part of the problem in *Re A Debtor* (*No.* 23 *of* 1939), [1939] 2 All E. R. 338. The debtor had made a statement to the creditors that he was insolvent and unable to pay his debts, and the Registrar found as a fact that this was notice that he had suspended or was about to suspend payment. A few days later the creditors received a circular purporting to be signed by a trustee asking for a statement of account, stating that a meeting of creditors was to be summoned, and asking for

delivery of certain goods to carry on the business. These they supplied and they also attended two meetings of creditors, at the latter of which they did not vote on a resolution for approving a trustee, and subsequently proposed a resolution for bankruptcy which failed. They subsequently received a cheque for payment of the goods supplied on the trustee's order. The Court of Appeal held that their conduct did estop them from relying upon the deed but did not amount to an assent, but that the petition filed by them based on the earlier act of bankruptcy, namely, notice of suspension of payment, was an independent act of bankruptcy on which they were entitled to rely.

Where the creditors are estopped from relying on the deed as an act of bankruptcy they are also estopped from relying upon any transaction that leads up to the deed. The learned Master of the Rolls cited from Phillimore, J., in *Re Jones Brothers*, [1912] 3 K. B., at p. 239 : " Circulars and statements leading up to or connected with the execution of a deed of assignment cannot be relied upon as independent acts of bankruptcy." In the case noted the notice of supension was on a different footing because it was not given in contemplation of the execution of the deed, since there was no intention even to consider the execution of a deed. The suggestion of executing the deed came three days later from the trustee.

This decision is of interest as illustrating the rule that a creditor can be estopped by conduct without assenting and that an independent act of bankruptcy can be employed.

What will amount to estoppel by conduct is not easy. So, mere assent to the deed may not be estoppel (*Re a Bankruptcy Notice*, [1924] 2 Ch. 76, cf. *Re Lee*, [1920] 2 K. B. 200) if the creditor has not set up the deed by his conduct as valid. Yet in *Re a Debtor* (1926), 95 L. J. Ch. 199, creditors who made further inquiries and stood by for fourteen days were held to be estopped. The facts in the case noted bear a resemblance to the case of *Re Brindly*, [1906] 1 K. B. 377, though there the creditors' case was not strengthened by the fact that they withheld their assent in order to get an advantage over other creditors.

The principle that a creditor who has not assented may rely on an independent act of bankruptcy was laid down by Vaughan Williams, L.J., in *Re Mills*, [1906] 1 K. B., at p. 392. On the facts of the case as found this seems to be a clear example of what would amount to an independent act of bankruptcy. Even a notice that the deed has been executed and requesting assent cannot be treated as independent though in a way this cannot be said to lead up to the deed : see *Re Woodroff*, 4 Mans. 46.

2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law

Agricultural holding—assessment of compensation where tenant holds two holdings and receives notice to quit one only.—The Agricultural Holdings Act, 1923, s. 12 (6), bases the compensation for disturbance payable in respect of an agricultural holding upon such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his goods, implements, stock, etc., but goes on to provide that, for the avoidance of disputes, such sum shall be computed at one year's rent of the holding unless a greater loss and expense be proved, in which case the sum recoverable is the loss and expense so incurred up to a maximum of two years' rent of the holding. By section 12 (8), where a tenant holds two or more holdings (whether from the same or different landlords) and receives notice to quit one or more but not all of the holdings, his compensation for disturbance in respect of the holdings quitted is to be reduced by such amount as represents the reduction (if any) of the loss attributable to the notice to quit by reason of the continuance in possession by the tenant of the other holding or holdings.

The question arises whether sub-section 8 is only directed to the calculation of the actual loss and expense where the tenant claims compensation in excess of one year's rent of the holding or holdings quitted, or whether it can be invoked by the landlord, in a case where the tenant has held two or more holdings, so as to reduce the tenant's compensation below his statutory minimum of one year's rent. It has been held by the Court of Appeal that the former is the correct interpretation of these sub-sections.

In *Bebb* v. *Frank*, [1939] 1 K. B. 558, the tenant held two holdings and received notice to quit one, the rent for which was £100 a year. The arbitrator found that by reason of the tenant's continued occupation of the other holding his actual loss and expense was only £10 10s. and applying section 12 (8), he reduced the minimum of £100 provided by sub-section 6 of the Act by £89 10s.

It was held by the Court of Appeal that the arbitrator had wrongly applied section 12 (8), which does not in any case operate so as to reduce the tenant's compensation for disturbance, once he has shown an actual loss, below the statutory minimum of one year's rent provided by section 12 (6).

Sub-section 8 was strongly commented upon by the Court of

Appeal, since it is evident that the reduction of loss therein referred to is a matter which must necessarily be taken into account by the arbitrator in determining the *unavoidable* loss, under sub-section 6, where compensation is claimed on the basis of loss or expense actually incurred in excess of one year's rent of the holding. MacKinnon, L.J., suggested that the only conceivable meaning or purpose of sub-section 8 is "as a warning to a hypothetically stupid arbitrator . . . that in ascertaining the unavoidable loss under sub-section 6 he must not estimate that loss *in vacuo* as though the tenant had to move his stock to some unascertained place, but he must take into account the fact that he has an available place to which to move them, and the cost of moving them to that available place will be one of the factors to be taken into account in ascertaining how much of his loss is avoidable or unavoidable". It is clear that the sub-section cannot be applied to deprive the tenant, once he has shown an actual loss, of his right to a year's rent. It must always be remembered that the tenant must prove *some* loss or expense before he can claim a year's rent: see *Minister of Agriculture and Fisheries* v. *Dean*, [1924] 1 K. B. 851; 93 L. J. K. B. 374; *Dunstan* v. *Benney*, [1938] 2 K. B. 1; 107 L. J. K. B. 311.

Application of Leasehold Property (Repairs) Act, 1938.—Although the Leasehold Property (Repairs) Act, 1938, applies by section 5 to leases created, and to breaches occurring, before as well as after the commencement of the Act, the Act does not apply retrospectively to steps that had already been taken before the new Act became law. Thus a notice already validly served under section 146 of the Law of Property Act, 1925, is not invalidated by the subsequent passing of the Act of 1938 containing further provisions as to the contents of notices under section 146. This common-sense construction of the somewhat vague language employed in section 5 of the Act of 1938 has been laid down by the Court of Appeal in *National Real Estate and Finance Co.* v. *Hassan*, [1939] 2 K. B. 61.

Severance of term—right of reimbursement in respect of whole rent paid under threat of distress.—The important case of *Whitham* v. *Bullock*, [1939] 2 K. B. 81, has settled a point which has long been obscure for lack of direct authority. Leasehold property became severed by assignment, the rent being apportioned between the two parts. One portion was cleared under the Housing Acts and the tenant of that part refused to pay the apportioned rent. The landlord thereupon threatened to distrain upon the other part

for the whole rent, as he was entitled to. Under this threat the tenants of that part paid the entire rent and claimed to be reimbursed the apportioned share of the rent by the other tenant. It was held by the Court of Appeal in a unanimous judgment delivered by Clauson, L.J., that they were entitled to be so reimbursed.

It is to be observed that the tenants who paid the entire rent did so not because they were under any liability to be *sued* for it but to avoid a distress for the whole amount: they were none the less forced by law to discharge the whole rent at peril of losing their goods. The tenants of both parts of the land had a community of interest in the subject-matter to which the burden was attached, that is, the two plots, but the burden had been enforced against the tenants of the one plot alone, and they accordingly were entitled to be reimbursed by the other tenant the share apportioned to that plot.

This case should be contrasted with *Johnson* v. *Wild* (1890), 44 Ch. D. 146, where a lessee of land assigned part to A, and sub-let another part to B, and it was held that A, on paying the entire rent on threat of distress, had no right of contribution against B. There the defendant, being merely a sub-lessee, could not have been sued for the sum which A had been forced to pay. In *Whitham* v. *Bullock* the defendant was directly liable to the landlord for the apportioned part of the rent which the plaintiffs had paid under threat of distress.

Preferential claim for rent in case of execution—whether levying of distress for rates an "execution" within Landlord and Tenant Act, 1709, s. 1.—In *Hickman* v. *Potts* the Court of Appeal has decided in favour of the landlord a question of great practical importance as between landlord and rating authority. The Landlord and Tenant Act, 1709, s. 1, enacts (to summarise its provisions) that goods and chattels upon lands let on lease are not liable to be taken in execution unless the party at whose suit the execution is sued out shall before removal of the goods off the premises pay to the landlord or his bailiff all arrears of rent due not exceeding one year's rent. A bailiff levied a distress for rates under a justice's warrant and removed the goods off the premises and sold them, with notice of but without satisfying the landlord's claim for rent. It was held by the Court of Appeal that the levy of a distress for rates is an execution within the meaning of the Landlord and Tenant Act, 1709, s. 1, and is therefore subject to the preferential claim of the landlord for rent under that section. The bailiff was therefore liable to the landlord in damages. It is indeed curious, as

was pointed out by Goddard, L.J., in delivering the judgment of the Court, that the point has never fallen to be decided before—*Hickman* v. *Potts*.

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3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration—annuities—residuary trust fund—annuities to be paid from income of fund with power to resort to capital—deficiency of assets—construction.—Where an annuity is not accompanied by a gift over of a capital sum directed to be set aside for it, there is no hardship in taking the annuity at its actuarial value and paying that sum outright (after it has abated, if necessary, rateably with other annuities and pecuniary legacies) to the annuitant. This, the system adopted in *Re Cottrell*, [1910] 1 Ch. 402, is therefore applied, unless the will shows a contrary intention, whenever the assets are not sufficient both to pay the pecuniary legacies in full and to leave a residue capable of producing enough income to cover the annuities. And if annuities only are abating (*e.g.*, where the pecuniary legacies have been given priority by the will, or where there are none), the same rule of administration is ordinarily observed, in order to do justice between the annuitants *inter se*: *Re Cox*, [1938] Ch. 556 (noted *ante*, Vol. 3, p. 99). Part of the reasoning in *Re Cox* was that there the will had directed a sum to be set aside sufficient to produce the annuities out of its income, and had given the annuitants a right of recourse to the capital of that fund in case its income should not suffice. Since the residuary estate proved in fact to be too small to allow an adequate sum to be set aside, it was clear that the right to resort to capital would soon exhaust any sum which could, on the facts, be set aside: the elderly annuitants, therefore, would be more likely to get their complete annuities paid in full, were a reduced sum set aside, than would the younger annuitants. And it was held that the testator could not be presumed to have intended such an inequitable result.

The facts of *Re De Chassiron, Lloyds Bank, Ltd.* v. *Sharpe*, [1939] W. N. 240; [1939] 3 All E. R. 321, the most recent case on this point, were very similar to those of *Re Cox*. The annuities amounted to £1,650 a year; the residuary estate was only sufficient to produce an income of £750 a year; and the ages of the annuitants ranged from forty to eighty years. But Morton, J., held, on the construction of the will, that to apply the rule in *Re Cottrell* would be inconsistent with the testator's intentions. The fact that the will gave the annuitants power to resort to capital in the event of

a deficiency of income, here showed that the testator had himself decided what was to be done in the event of a deficiency of assets; and his intentions must be observed. It would appear that the real distinction between *Re Cox* and *Re De Chassiron* is that in *Re Cox* the will directed a sum to be set aside *sufficient to produce the annuities from income* and added a power to resort to the capital thereof. That testator, therefore, was not adverting to the position which would arise if it should prove to be impossible to set aside an adequate sum out of the assets. Accordingly, he was not construed to have directed that, failing an adequate sum, an inadequate sum must be set aside and its income augmented from its capital. In *Re De Chassiron*, however, the will did not direct an adequate sum to be set aside; it merely bequeathed the whole of the residue to trustees upon trust to pay the annuities out of its income, adding power to resort to capital in case of a deficiency. Here, therefore, the testator evidently intended that any deficiencies in the income of the residue should be made up out of the capital of the residue, whether or not the residue was an adequate fund, at the start, to produce the annuities from income.

In the result, therefore, the annuities operated, to the extent of the deficiency of income, to reduce the capital of the residuary fund. And although there was a gift over to charity on cesser of the annuities, the testator had evidently intended that the charity's ultimate right to the residue should be diminished by any withdrawals of capital required for the annuitants.

Administration—annuities and pecuniary legacies—direction to set aside a fund—gift over of fund after cesser of annuity—deficiency of assets—construction.—When a testator's residuary estate is not sufficient both to pay pecuniary legacies in full and to provide from income any annuities bequeathed by his will, the annuities and pecuniary legacies ordinarily abate rateably, the former being taken at their actuarial value. If, however, the will directs a fund to be set aside sufficient to produce the annuities from income, and further directs that this fund is to be paid on the death of the annuitants to X, the course to be adopted will depend upon the construction of the particular will; for it is not likely that the testator would have wished X to be sacrificed by allowing the annuitants to take the capitalised value of their annuities. Thus, in *Re Nicholson*, [1938] 3 All E. R. 270 (noted *ante*, Vol. 3, pp. 99, 346), Crossman, J., held that the fund to be set aside should abate; whilst in *Re Farmer*, [1939] 1 All E. R. 319 (noted *ante*, Vol. 3, p. 346), Farwell, J., held that the annuities should be taken at, and abate on, their actuarial value, and that

this abated capital sum should be paid outright to the annuitant without preserving any of it for the persons entitled under the gift over. The same problem has now arisen before Simonds, J., in *Re Carew, Channer* v. *Francklyn*, [1939] W. N. 254; [1939] 3 All E. R. 200. Although in this case there was no express direction to set aside a fund, such a direction was implied from a gift over, on the death of each annuitant, of the capital representing his annuity. The learned Judge, on the construction of the will before him, treated each annuity with its gift over as a settled legacy of such a capital sum as would produce the annuity from income when invested in $2\frac{1}{2}$ per cent. Consols. Accordingly, he held that these capital sums must abate rateably with the pecuniary legacies; thereupon, each annuitant would receive annually only so much income as the abated sum would produce if invested as above. This solution, be it noted, holds the scales evenly between each annuitant and his remainderman, and seems to have much to commend it. But it is very difficult to see precisely how these three decisions, each adopting a different method, should be distinguished from each other on the construction of the wills concerned. And one cannot but feel that some authoritative principle is needed on which personal representatives may be given confident advice without the necessity of an application to the Court.

Administration—apportionment—settled residuary gift—annuity charged aliunde upon some of the residuary property—incidence of annuity—rule in Allhusen v. *Whittell inapplicable.*—The rule in *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295, whereby the incidence of a testator's debts and legacies is adjusted as between tenants for life and remaindermen interested in the residuary estate, has been stated (*ibid.*, p. 303) as follows: "In the book-keeping which the Court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year." As regards any *periodic* sums, such as a rentcharge or annuity, which the deceased had bound himself to pay, each instalment as it becomes payable is regarded as being paid by means of a piece of the capital, together with the income on that piece of capital as from the date of the testator's death down to the date of the payment. In *Re Darby, Russell* v. *MacGregor*, [1939] W. N. 223; [1939] 3 All E. R. 6, the Court of Appeal was invited to apply this rule in a case where the testatrix had neither bound herself personally, nor bound her estate, to pay the annuity concerned. Her residuary bequest, to A for life with remainder to B, comprised certain assets

which had come to her as residuary legatee under her father's will; and her father, by his will, had bequeathed that residue to her *subject to and charged with the payment by her* of an annuity to his widow. The Court of Appeal held that, since the testatrix here had entered into no covenant to pay that annuity and had therefore incurred no personal liability to the annuitant, the rule in *Allhusen* v. *Whittell* was inapplicable. Consequently, the ordinary rule applied whereby a tenant for life must keep down, out of income, any annual charge upon the settled property. This result was reached by overruling (if inconsistent) the decision of Joyce, J., in *Re Thompson*, [1908] W. N. 195, and by applying his decision in *Re Popham* (1914), 111 L. T. 524. In the latter case, the question had concerned a rentcharge which, by an *inter vivos* settlement, the testator had imposed upon certain property without himself assuming any personal obligation to pay it.

Administration — donatio mortis causa — delivery — chattels — choses in action—bank deposit book.—The vexed question as to what amounts to a sufficient act of delivery for the purposes of a *donatio mortis causa* arose before Luxmoore, L.J., in *Delgoffe* v. *Fader*, [1939] W. N. 303; [1939] 3 All E. R. 682. A bed-ridden lady handed a bag to the plaintiff, in whose house she was then living, said to her "Put this bag into your wardrobe, so that I can keep my eye on it", and added "Should I die, I wish you to have the bag and everything that is in it". The plaintiff put the bag into the wardrobe, as instructed. Some days later the donor was removed to a hospital and died. The bag contained jewellery and a bank deposit book relating to a deposit account of approximately £1,000. As regards the jewellery, Luxmoore, L.J., held that there was a complete delivery which would have sufficed even for a gift *inter vivos*, despite the direction to place it in a wardrobe which was then in use by the donor. The bag had been delivered *mortis causa* to the plaintiff on a former occasion also. But that delivery had occurred in the donor's own house; and the bag had been replaced, on the donor's directions, in her own locked wardrobe the key of which she kept in her washstand. In that case, therefore, the donor had retained dominion over the bag and its contents, and the delivery was insufficient—even as regards the jewellery. On neither occasion was there a good *donatio mortis causa* of the donor's deposit at the bank. Although a valid *donatio mortis causa* may be made of a chose in action by delivering some document which "expresses the terms on which the subject-matter of the chose in action is held by the donor, or the terms under which the chose in action came into existence", the deposit

book in the present case was not such a document. Unlike a Post Office savings bank deposit book (see *Re Weston*, [1902] 1 Ch. 680), it did not contain substantially the whole of the terms regulating the contract of deposit, nor was its production essential when money was deposited or withdrawn.

Administration—executor's right of retainer—costs of administration action.—The decision of Crossman, J., in *Re Wester Wemyss, Tilley* v. *Wester Wemyss*, [1939] 1 All E. R. 382 (noted *ante*, Vol. 3, p. 349), has now been affirmed by the Court of Appeal: [1939] 3 All E. R. 746. It is well established that an executor's right of retainer out of the assets, in respect of a debt owed to him by his testator, is not prejudiced by his paying the assets into Court in the course of an administration action. This case decides further that he can so retain even as against the costs of the person who instituted the proceedings for administration, and that (Luxmoore, L.J., dissenting on this point) the Court's discretion as to costs ought not to be construed as enabling it to give such costs priority over the right of retainer. Although Part I of the First Schedule of the Administration of Estates Act, 1925, expressly gives priority to the funeral, testamentary, and *administration* expenses (which presumably include the costs of an administration action), the Court of Appeal held unanimously that this does not affect the right of retainer.

Administration—hotchpot clause—share of residue—appropriate date for valuation.—When a will contains a hotchpot clause, questions sometimes arise both as to the precise sum which should be brought into hotchpot and as to the value to be placed, for the purposes of the hotchpot clause, upon the beneficiary's interest under the will. In *Re Wills*, [1939] Ch. 705 (note *ante*, Vol. 3, p. 440), it was held that *inter vivos* advances should be brought into account at the value they bore when they were made *plus* interest thereon at 4 per cent. from the death of the testator. Now, in *Re Gunther's Will Trusts, Alexander* v. *Gunther*, [1939] W. N. 265; [1939] 3 All E. R. 291, the question has arisen how the capital value of a beneficiary's share of residue should be assessed for the purposes of such a hotchpot clause. This is a question of particular importance when the final ascertainment and distribution of the residue are long delayed; for it may well be that the value of the beneficiary's share therein will rise or fall during the period of delay. Three possible dates for the valuation were suggested by counsel: (i) the date of the death of the testator, (ii) the date of retainer for legacy duty purposes, (iii) the date of distribution.

Farwell, J., decided that, unless the will, properly construed, indicated that the valuation should be made at some other date, the date to be taken is that of the death of the testator. Apparently this is the first reported case on the point.

Administration—judgment by default against executors for debt of deceased—implied admission of assets—return of nulla bona on execution—rebuttable presumption of devastavit.—It is old law that a judgment by default, obtained against personal representatives in respect of a debt owed by the deceased, raises a conclusive presumption that they had at the date of the judgment sufficient assets wherewith to satisfy it. Moreover, if execution issues in respect of that judgment and the sheriff makes a return of *nulla bona*, this raises a presumption that the personal representatives have committed a *devastavit* and so are personally liable to satisfy the judgment out of their own pockets. Farwell, J., has decided, however, in *Batchelar* v. *Evans*, [1939] W. N. 295; [1939] 3 All E. R. 606, that this latter presumption is rebuttable. A mortgagee had sued the executors of the deceased mortgagor in the King's Bench Division for the amount of the mortgage debt, and the executors had allowed judgment to go against them by default. Two beneficiaries then instituted proceedings in the Chancery Division for the administration of his estate; the Court appointed a receiver and ordered the executors to hand over the assets to him; and an order for administration was made. In the course of the administration action, the mortgagee's security was sold at a price substantially less than the mortgage debt. The mortgagee thereupon issued a writ of *fieri facias* for the enforcement of his judgment, and then, relying upon the sheriff's return of *nulla bona*, sued the executors for a presumed *devastavit*. The executors pleaded that the return of *nulla bona* was due to their having handed over the assets to the receiver, as they had been ordered to do in the course of the administration action. And this explanation was held to rebut the presumption that the lack of assets when the sheriff went into possession had been caused by some *devastavit* committed by them since the date of the judgment.

Construction—class gift—vested subject to be divested—gift over for children of member dying before period of distribution—analogy to Lassence v. *Tierney*.—When property is bequeathed to A for life with a direction that the property, on A's death, is to be divided among specified persons (whether named individually or comprised in an already ascertained class), the mere fact that the property cannot be divided among those persons

until A's life estate is over does not render their interests contingent upon their surviving A. When future gifts are thus postponed simply in order to let in a prior interest they are vested —not contingent. A recent illustration of this rule is *Browne* v. *Moody*, [1936] A. C. 635. Another established rule is that a vested interest can only be defeated by a clear and unambiguous forfeiture clause, or by an effectual gift over to someone else. Accordingly, in *Smither* v. *Willock* (1804), 9 Ves. 233, a bequest to the testator's widow for life with a provision that on her death the capital should be divided equally among his brothers and sisters named in the will conferred upon those brothers and sisters interests which, though postponed in enjoyment during the widow's lifetime, were vested in interest from the moment the testator died. There was also a provision in the bequest that, in case any such brother or sister should die in the lifetime of the widow, the share of the brother or sister so dying should be divided among his or her children. In fact a brother died in the widow's lifetime without ever having had a child. The Court held that his share was vested subject only to be divested in the event of his death in the lifetime of the widow *leaving children*. Hence the divesting clause did not operate upon his vested share; and his share devolved accordingly upon his personal representatives.

In *Greenwood* v. *Greenwood*, [1939] 2 All E. R. 150, the Judicial Committee has followed *Smither* v. *Willock*, on facts that were almost identical. The testator devised all his property in Fiji on trust for his widow for life, and after her death on trust to sell and divide the proceeds "equally amongst all my brothers and sisters now living and if any of them shall have predeceased my wife then to the child or children of such brother or sister shall be given the share such brother or sister would have received if alive". One of the surviving sisters of the testator predeceased his widow. This sister had never married: the gift over in favour of her children was therefore ineffective. Accordingly, her vested right to share in the ultimate division of the property passed, on her death, to her personal representatives. Lord Thankerton, delivering their Lordships' judgment, added that this principle of construction is implicit also in the rule in *Lassence* v. *Tierney*: thus, when a trust or gift over is engrafted upon an absolute gift, the absolute gift takes effect if the trust or gift over fails.

Will—covenant not to revoke—whether actionable on revocation by marriage—construction of covenant—Wills Act, 1937, ss. 18, 20.—If a testator enters into a covenant (*e.g.*, in a deed of separation) not to revoke certain provisions of his will, is his subsequent

marriage an actionable breach of the covenant? In *Re Marsland, Lloyds Bank* v. *Marsland*, [1938] 4 All E. R. 279 (noted *ante*, Vol. 3, p. 226), Farwell, J., held that, so far as the covenant is inconsistent with the testator's subsequent marriage, it is contrary to public policy and unenforceable. On appeal, the Court of Appeal has reached the same result by a different route: [1939] W. N. 251; [1939] 3 All E. R. 148. Unless it shows a clear contrary intention, a covenant by a testator not to "revoke" his will should be construed to refer only to acts of revocation performed as such and for that purpose. *Prima facie*, therefore, a covenant not to revoke is confined to revocations under section 20 of the Wills Act, 1837, and has no application to revocations by marriage under section 18. The covenant which was under consideration in *Robinson* v. *Ommaney* (1883), 23 Ch. D. 285, C. A., was wider than the present covenant, and clearly extended to revocations by marriage.

Will—lapse—bequest to child contingent on reaching twenty-five —child predeceases testator aged twenty-four—Wills Act, 1837, s. 33.—Section 33 of the Wills Act, 1837, applies where a devise or bequest is made to a person who is a child or other issue of the testator "for an estate or interest not determinable at or before the death of such person". It enacts that if such a person predeceases the testator, leaving issue who survive the testator, the devise or bequest "shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator". In *Re Wolson, Wolson* v. *Jackson*, [1939] W. N. 282; [1939] 3 All E. R. 852, a testator had bequeathed a share of residue to his daughter in words which were held to render the bequest contingent on her attaining twenty-five years of age. She died at the age of twenty-four, in the testator's lifetime, leaving issue who survived him. The testator (her father) died nearly two years after her. Accordingly, had she died immediately after him she would have reached twenty-five, and so would have qualified for her bequest. It was argued that section 33 compels one to regard her as having died immediately after the testator, and thus to hold that the gift to her became vested and effective. But Crossman, J., held section 33 to be inapplicable for two reasons. First, the gift to her was, on the facts, for an interest "determinable on her death". Secondly, the section is intended merely to save gifts from "lapse"; its purpose, therefore, is merely to save gifts from failure through the death of a donee in the testator's lifetime—not to save them from the consequences of conditions precedent imposed upon them by the will.

4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Tax-free annuities—annuitant's reliefs and allowances.—There are two well-known decisions relating to the treatment of annuitants' reliefs and allowances in the case of what are compendiously known as tax-free annuities. In *Re Pettit*, [1922] 2 Ch. 765, the annuity was given "free of income tax", and the decision was that the annuitant must account to the trustees for so much of the income tax repayable to her in respect of reliefs and allowances as corresponded to the proportion which the annuity bore to her total income. This case was distinguished in *Re Jones*, [1933] Ch. 842, where the annuity was "such an annuity as after deducting income tax at the current rate therefrom will amount to the clear yearly sum of £——". It was held that income tax at the "current rate" was to be construed as meaning income tax at the standard rate for the time being in force, and not the tax which, taking reliefs and allowances into account, the annuitant would ultimately have to pay. It followed that the annuitant's reliefs and allowances did not concern the trustees, who were merely directed to pay the stated sum in full without deducting tax. Of these decisions, both of which were approved, *Re Pettit* was held by the Court of Appeal to be applicable in *Re Maclennan*, 55 T. L. R. 830, which was concerned with a testamentary direction to pay an annuity of such amount as would leave in the annuitant's hands "the sum of £—— clear of all deductions for income tax but not surtax". There was here no such reference as there was in *Re Jones*, above, to "income tax at the current rate". On the construction of the will, and having regard, in particular, to the words "leave in his hands", followed by the words "clear of all deductions for income tax but not surtax", it was held that the case resembled *Re Pettit* and not *Re Jones*, and that the annuitant was not entitled to more than an ultimate clear sum of the stated amount after all tax liability as between him and the Revenue had been settled.

Income settled on children—Finance Act, 1936, *s.* 21 (1) *and* (9).—The scope of the definition of "settlement" and "settlor"

in paragraphs (b) and (c) of sub-section 9 of section 21 of the Finance Act, 1936, which deals with income settled on children, was considered in *Copeman* v. *Coleman*, [1939] W. N. 255, where the subject-matter of the appeal was a claim to repayment of tax on dividends received by certain children from a company controlled by their parents. The dividends in question were dividends on preference shares in a private trading company formed in 1933 with the parents of the children as the sole shareholders. Preference shares were created, and one such share was allotted to each child, in 1937. It appeared from the Case Stated that the children had money of their own, and there was no suggestion that the money paid for the shares was provided by the parents. Lawrence, J., however, took the view that, though there was no express finding to that effect in the Case Stated, it was clear from the facts there set forth that the transactions which resulted in the payment of the dividends to the children were not *bona fide* commercial transactions, and that, that being so, they none the less amounted to a " settlement ", within the meaning of that expression as defined in section 21 (9) (b), because some trifling consideration had been given for the shares. The learned Judge further held that, though the preference shares had been created and issued by the company, the fact that the company was a separate entity distinct from its shareholders did not prevent the father of the children from being a " settlor ", within the meaning of the statutory definition, as a person who had, through the medium of the company, indirectly provided funds for the purposes of the transactions which constituted the " settlement ". The Appeal Commissioners' decision in favour of the repayment claims was accordingly reversed on the ground that, by virtue of sub-section 1 of section 21, the dividends must be deemed not to be income of the children.

Income settled on children—Finance Act, 1936, *s.* 21 (8) *and* (10).—The decision of the Court of Session in *C. I. R.* v. *Warden*, Tax Leaflet 986 (see *The Conveyancer*, March, 1939, at pp. 354—355), did not conclusively dispose of the question whether the provisions of sub-section 8 of section 21 of the Finance Act, 1936, with regard to certain categories of settlements which " shall not be deemed to be irrevocable " are to be taken into account in applying sub-section 10, which excludes from the scope of section 21 any settlement made or entered into before April 22, 1936, which immediately before that date was irrevocable. It has now been held in *C. I. R.* v. *Delamere*, 55 T. L. R. 872, that a settlement

which was made before April 22, 1936, and which was immediately before that date irrevocable in the ordinary sense of that expression, will, nevertheless, not be excluded from the scope of section 21 if it was within any of the categories of settlements mentioned in sub-section 8 as settlements which are not to be deemed to be irrevocable. There was another point which was also decided in favour of the Crown. The taxpayer contended that section 21 could not in any case apply to income paid to or for the benefit of the child, within the meaning of sub-section 1 or sub-section 2 of section 21, before the date on which the Finance Act, 1936, received the Royal Assent, *viz.*, July 16, 1936. This contention was rejected by the learned Judge, who took the view that section 21 operated as from the commencement of the year of assessment 1936/37, *viz.*, April 6, 1936.

Rule 21 *of the All Schedules Rules—person "by or through whom" payment made.*—In *Howells* v. *C. I. R.*, 55 T. L. R. 850, the essential facts were that X, a solicitor, lent money to Y, a client, at interest. X also acted as solicitor for Y in connection with the sale of certain property and in that capacity received the proceeds of sale. In remitting the proceeds to Y, X deducted the net amount (after deduction of tax) of the interest due to him from Y. A part of the interest was not covered by Y's taxed income, and in respect of the amount not so covered a Rule 21 assessment was made on X as the person "by or through whom" the payment was made. X contended that he was neither the person by whom the payment was made, since it was a payment by Y, nor was he the person through whom it was made, since X could not be a person through whom a payment was made to X himself. In rejecting this contention, Lawrence, J., pointed out that the provisions of Rule 21 were collecting provisions and as such must be liberally interpreted on the principle laid down by Lord Parker in *Drummond* v. *Collins*, 6 T. C. 525, at p. 540. The learned Judge took the view that, assuming the payment to have been made by Y, it must, for the purpose of applying Rule 21, be treated as a payment made through X, the real effect of the transaction being that the payment was made to X, in his capacity as the person entitled to the interest, through X in his separate capacity as Y's solicitor, through whose hands the proceeds of sale passed on their way to Y.

Child allowance—payments to divorced wife for maintenance of children.—The effect of section 21 (3) of the Finance Act, 1920 (as amended) is that child allowance cannot be claimed in respect of any child who "is entitled in his own right to an income exceeding £60 a year". Where a divorced husband is required under an Order of the Court to pay a specified sum annually to his former wife for the maintenance and education of a child of the marriage, do these payments constitute, for the purposes of the child allowance, income to which the child is entitled in his own right? This was the question which was raised, and answered in the negative by Lawrence, J., in *Stevens* v. *Tirard*, 55 T. L. R. 838. The learned Judge pointed out that section 21 (3) does not speak of a child who enjoys the benefit of an income exceeding a stated amount, but of a child who is entitled to such an income in his own right. Where payments are ordered to be made to a divorced wife for the maintenance and education of a child, the child's right, and his only right, is to be maintained and educated. He has no title to the money itself, and the mother is not accountable for any part of it not required for his maintenance and education. Even to the extent to which the money has in fact been expended for the benefit of the child it is not income of his to which he is entitled in his own right within the meaning of section 21 (3), for the case is not analogous to that of a trust, and such decisions as *Drummond* v. *Collins*, 6 T. C. 525, and *Johnstone* v. *Chamberlain*, 17 T. C. 706, which were invoked on behalf of the Crown, do not, therefore, apply. The essential distinction is between money impressed with a trust and money paid upon a condition, and it was because the payments in *Stevens* v. *Tirard* were held to fall within the latter and not the former category that the Crown's appeal failed.

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5. *DEATH DUTY CASES.*

By L. J. STEIN, Barrister-at-Law.

Estate duty on death of tenant for life—New York Settlement.—It is a well established principle that on the death of a tenant for life, estate duty is leviable on the footing that the settled property passed on the death, since the property as a whole changed hands, and it is immaterial that the tenant for life had a limited interest which was incapable of passing: see *Cowley* v. *C. I. R.*, [1899] A. C. 198, and, for a recent application of the principle, *Christie* (*or Dunderdale's Trustees*) v. *Lord Advocate*, [1936] A. C. 569. An unsuccessful attempt to find an exception

to the rule was made in *Lord Advocate* v. *Clark's Trustees*, [1939] S. L. T. 1, where the material facts were that under a settlement made by the deceased, who was an American citizen domiciled in the State of New York, he was entitled for life to the income of certain shares admitted to be locally situate in Scotland. It was common ground that the law governing the settlement was the law of New York, and that under New York law the deceased had no estate or interest, legal or equitable, in the trust property, but only the right to enforce in equity the due administration of the trust. It was held that, even assuming it to be the case that in this respect the law of New York was distinguishable from that of Scotland, there would still be a passing of the settled property for estate duty purposes, since the decisive fact was that on the death of the deceased the property changed hands, and the precise nature of the rights which ceased on his death was immaterial. This was of itself sufficient to dispose of the case, but it was further pointed out that, whatever might be a life tenant's position under English law, under the law of Scotland, at all events, his position was, in fact, precisely the same as it was stated to be under the law of New York. It will be remembered that there are certain income tax decisions—the two *Archer-Shee Cases*, 11 T. C. 749 and 15 T. C. 693—which turn on the existence of a distinction between a life tenant's rights under the law of England and the law of New York respectively. The first case was decided against the beneficiary on the footing that the law of New York must be assumed to be the same as that of England, while the second case was decided in the beneficiary's favour on the footing that the evidence subsequently adduced had shown that assumption to be incorrect. But so far as the law of Scotland is concerned, the view expressed by the Court of Session in *Lord Advocate* v. *Clark's Trustees*, above, was that the life tenant's rights are no different from, and no greater than, his rights under the law of New York, and the Lord President, having cited Lord Wrenbury's well-known observations, in the first *Archer-Shee Case*, 11 T. C., at p. 779, on the life tenant's position in English law, went on to say that "no Scottish lawyer . . . would describe the rights of life-renter in these terms, which are entirely alien to our law". Similarly, Lord Moncrieff, referring to the admitted effect of the law of New York, observed that "that occurs to me as being a very concise but very satisfactory formulation of the law of Scotland", though he added that "it would rather appear from the observations in the *Archer-Shee Case* that the trust-law of England may be different".

Estate duty—policy moneys—aggregation.—Save as to one point, the decision of the Court of Appeal in *Westminster Bank* v. *Att.-Gen.*, [1939] 2 All E. R. 72, follows the decision of that Court in *Hodson's Case*, [1939] 1 Ch. 343, as to the aggregation for estate duty purposes of the accumulated income of settled property (see *The Conveyancer*, March, 1939, at pp. 358 ff.). The question not fully covered by the decision in *Hodson's Case* was that which arose with regard to the treatment for estate duty purposes of certain policy moneys payable at the death of the deceased under life policies settled by him on trust, in the events which happened, to divide the income between such of certain children as attained the age of twenty-one or married under that age, each child being given a power of appointment over the capital of his share. The policy moneys included reversionary bonuses declared after the date of the settlement. Before judgment was delivered by the Court of Appeal in the *Westminster Bank Case*, the House of Lords had decided in *Tennant* v. *Lord Advocate*, [1939] 1 All E. R. 672 (see *The Conveyancer*, June, 1939, at pp. 445 ff.) that where property consisting of the proceeds of a life policy is chargeable with estate duty under section 2 (1) (d) of the Finance Act, 1894, it cannot be said to be property in which the deceased never had an interest so as to be excluded from aggregation. In applying this decision in the *Westminster Bank Case*, Clauson, L.J., who delivered the judgment of the Court, pointed out that although, under the settlement there in question, the interests which sprang into being on the death of the deceased were life interests and not absolute interests in the property represented by the proceeds of the policy, it was none the less the property which was deemed to pass, and not the beneficial interests which arose on the death. It was, therefore, with reference to the proceeds of the policy that the question must be asked whether the property was property in which the deceased never had an interest, and, in the light of the decision in *Tennant's Case*, that question had clearly to be answered in the negative, notwithstanding that it was property which was deemed to pass only to the extent of the beneficial interest arising on the death, or, in other words, to the extent of the principal value of the children's life interests.

Estate duty—property not passing to the executor as such—Finance Act, 1894, *s.* 9 (1).—In *Re Stopford's Estate*, 17 A. T. C. 628, the High Court of Eire had before it a question arising under

the somewhat unsatisfactorily worded provisions of section 9 (1) of the Finance Act, 1894, by which "a rateable part of estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable". The question raised was with regard to the nature and extent of the apportionment evidently contemplated by section 9 (1). It was conceded on behalf of the Revenue authorities that section 9 (1) is not to be understood as meaning that so much of the estate duty payable in respect of the estate as is attributable, on a proportionate basis, to property not passing to the executor as such is a charge on the whole of that property—a construction which would be clearly inconsistent with the scheme of section 9 as a whole. On the other hand, Maguire, P., rejected the taxpayer's contention that the effect of section 9 (1) is to charge "each identifiable part of the property" not passing to the executor as such with so much of the duty as is proportionate to the value of that part. Between these two extremes it is not easy to say precisely where the line is to be drawn. In *Re Stopford's Estate* the part of the property not passing to the executor as such which it was sought to segregate for the purpose of apportioning estate duty consisted of the proceeds of redemption of part of a fee farm rent included in the realty comprised in the estate. On the ground that there was here no such "clear line of demarcation" as could be drawn (for example) between settled realty and free realty, the learned Judge declined to limit the charge by reference to the apportionment contended for on behalf of the taxpayer in this particular case, but no general proposition emerges from the decision, which merely illustrates the difficulties that may arise, in the absence of authoritatively defined principles, in the application of section 9 (1).

Estate duty—gift inter vivos—*identification of property to be valued.*—Section 7 (5) of the Finance Act, 1894, provides that the principal value of any property on which estate duty is chargeable shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch, if sold in the open market at the time of the death of the deceased. Where a gift of property has been made by way of voluntary settlement by a person who died within the three years' period mentioned in section 59 of the Finance (1909–10) Act, 1910, so that estate duty is attracted under section 2 (1) (c) of the 1894 Act, and the property comprised

in the settlement at the time of the settlor's death is not the same as the property originally settled, on what basis does the valuation required by section 7 (5) fall to be made? It is clear that the value to be taken is the value at the time of the death of the deceased, but what is the property to be valued? Is it the property actually settled, in the form in which it was transferred to the trustees of the settlement, or is it the property constituting the trust fund in whatever form it may exist at the time of the settlor's death? This was the question which came before Simonds, J., in *Re Payne, Poplett* v. *Att.-Gen.*, 108 L. J. Ch. 339. Holding that no clear guidance was obtainable from the decision of the Court of Session in *Strathcona* v. *C. I. R.*, [1929] S. C. 800, the learned Judge came to the conclusion that the trust fund must, for the purpose of charging estate duty under section 2 (1) (c) of the Finance Act, 1894, be considered to have a continuing identity, and that the duty was chargeable on the value of the trust fund, at the time of the settlor's death, in the form in which the trust fund existed at that time, irrespective of any changes which might have occurred since the date of the settlement through the exercise by the trustees of their powers of making and varying investments. Subject to any appeal which may be brought, this decision disposes of a difficult point on which authoritative guidance has hitherto been lacking. The decision related to a gift by way of settlement and not to an outright gift such as was under consideration in *Strathcona's Case*, above. As to outright gifts, the learned Judge observed that it was, at all events, not clearly established that what had to be valued was the actual subject-matter of the gift, regarded as in a hypothetical state of preservation in the condition in which it was given. That being so, he felt free to arrive at the conclusion already stated with regard to gifts by way of settlement, while recognising that with regard to outright gifts there remained problems which were, in his opinion, " well-nigh insoluble ".